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Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

IN THE MATTER OF
JAMES B. DANIELS, an Attorney-at-Law of the
State of New Jersey,
Petitioner,
—v.—

SUPERIOR COURT OF THE STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Constitution prohibits states from punishing conduct as criminal contempt, and summarily, under a standard of mere "capacity" or "tendency" to obstruct the administration of justice.
2. Whether the summary criminal contempt conviction of a criminal defense attorney for a spontaneous non-verbal grimace of frustration in response to a critical ruling, made outside the presence of the jury, violates his first amendment rights of expression and the sixth amendment rights of his client to the vigorous representation of counsel.
3. Whether the Constitution guarantees a person the right to representation of counsel before being imprisoned summarily for criminal contempt.

4. Whether petitioner was afforded a fair hearing for criminal contempt that comported with due process, where petitioner disputed the trial judge's characterization of his non-verbal gestures for which he was held in contempt, immediately denied any disrespectful intent, and the statements of other witnesses contained in affidavits subsequently admitted to supplement the appellate record also materially contradict the judge's findings.

LIST OF PARTIES

The caption of the case contains the names of all parties except the organizations appearing amicus curiae before the New Jersey Supreme Court: New Jersey Department of the Public Defender; American Civil Liberties Union of New Jersey; Center for Constitutional Rights; Association of Criminal Defense Lawyers of New Jersey; New Jersey State Bar Association; and Trial Attorneys of New Jersey.



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OPINIONS BELOW

The decision of the Supreme Court of New Jersey is reported at 118 N.J. 51, 570 A.2d 416 (1990), and is reprinted in the Appendix. (1a-66a) The decision of the New Jersey Superior Court, Appellate Division, is reported at 219 N.J. Super. 550, 530 A.2d 1260 (App. Div. 1987), and is reprinted in the Appendix. (67a-204a). The order and supplemental order of the trial court holding defendant in contempt and imposing sentence are unreported. (App. at 205a, 209a).

JURISDICTION

The judgment and opinion of the Supreme Court of New Jersey, affirming the judgment of the trial court summarily convicting defendant of contempt, was entered on February 28, 1990. On May 16, 1990, Associate Justice William Brennan signed an order extending petitioner's

time to petition for certiorari to and including June 18, 1990. This Court has jurisdiction to review the judgment of the Supreme Court of New Jersey pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

FIRST AMENDMENT UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SIXTH AMENDMENT UNITED STATES CONSTITUTION

Jury trial for crimes and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed by the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT, SEC. ONE
UNITED STATES CONSTITUTION

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J.S.A. 2A:10-1

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

- a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.

18 U.S.C. § 401 (1970)

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT OF THE CASE

A. Procedural History

On March 19, 1986 petitioner James B. Daniels, Esq. was convicted of contempt by a judge of the Superior Court of New Jersey and sentenced to two days in jail and a fine of \$500.00. Later that day, the Appellate Division granted leave to appeal and a stay of sentence. (207a) On March 24, 1986, the trial court issued a supplemental Order of Contempt. (209a)

On May 2, 1986, petitioner filed a motion to supplement the record (226a) through a remand for the taking of testimony, which was denied by Appellate Division Order dated June 2, 1986. (229a) The court ordered instead that the affidavits of James Tighe and James B. Daniels be appended to the record. (229a) On July 14, 1986, the court granted the state's motion to supplement the record with the affidavit of Thomas Simon.

On July 30, 1987 the New Jersey Appellate Division affirmed the conviction of contempt by a divided court, but reversed the jail sentence imposed on petitioner. See Opinion at 67a to 204a. On February 28, 1990, the New Jersey Supreme Court affirmed the judgment of the Appellate Division with respect to all issues. See Opinion at 1a to 66a.

B. Statement of Facts

Petitioner, a public defender, represented the defendant in State v. McMahon, a trial for armed robbery, in which the sole evidence against the defendant originally was a stranger's identification. During pretrial hearings on March 18, 1986, there was long and passionate argument concerning a polygraph test that the state sought to introduce based on an executed stipulation. (1T4-13ff; 1T46-1 to 47-21).¹ Petitioner moved

1. "1T" refers to the transcript for March 18, 1986; "2T" refers to the

to exclude the State's polygraph test, or in the alternative to rebut it with expert testimony demonstrating the unreliability of polygraph tests, or with defendant's own prior polygraph results indicating innocence. (1T4-13ff; 1T37-19 to 23). The trial judge ruled adversely on all points.

The transcript of this argument evidences mounting tension and the judge's active participation in an aggressive give-and-take with petitioner:

MR. DANIELS: [A]s part of my cross-examination of the state's expert polygraphist, will I be permitted to read the stipulation in its entirety, making reference to the fact he was aware that another test had been conducted?

THE COURT: Absolutely not. There will be no reference, directly or indirectly, to that prior examination. You will not present to the jury, directly or indirectly by inference or otherwise, the fact that there was a prior examination. It is totally and completely inadmissible.

transcript for March 19, 1986.

MR. DANIELS: Judge, if I may, what this stipulation says --

THE COURT: I don't want to hear any further argument on it. I will not permit further argument on it. I gave you your chance earlier. It's over.

MR. DANIELS: I have not been able to argue this point.

THE COURT: I'm sorry. I asked you any other point on the stipulation. You said no. No further argument.

MR. DANIELS: Judge --

THE COURT: Mr. Daniels, did you hear me?

MR. DANIELS: Yes, sir. I must insist --

THE COURT: You will not get it.

MR. DANIELS: I have not been given an opportunity to argue this.

THE COURT: You will not get this.

MR. DANIELS: I must have misunderstood the Court with reference to --

THE COURT: We've been doing this for over two hours. This hearing is over. (1T61-15 to 62-24).

Matters became more heated as the day proceeded. Following a lengthy presentation by petitioner of the propriety of the court taking judicial

notice of studies on the unreliability of polygraph examinations, the trial judge responded, "So what? So what on all of this?" (1T89-4). This produced the following exchange:

MR. DANIELS: So what, Judge?

THE COURT: That's exactly what I said. So what?

MR. DANIELS: There couldn't be anything more important. I have been denied the opportunity to bring in my experts to talk about this.

THE COURT: No you haven't been denied. You went into a stipulation agreeing not to do that. You weren't denied anything.

MR. DANIELS: I am denied that; okay? The Court has ruled. I have said in spite of my stipulation I have asked to do this and the Court refused to allow me to.

THE COURT: The answer is no, unequivocally, unalterably, no. Anything else on this point?

MR. DANIELS: I just want to make sure that I understand the Court's ruling.

THE COURT: Oh, stop. Don't posture with me. Anything else on this point?

MR. DANIELS: No.
(1T89-5 to 25).

Petitioner's subsequent motion requesting the court to take judicial notice of certain scholarly articles so that petitioner could educate the jury on what he considered to be the crucial evidence in the case, was denied after considerable oral argument. (1T85-3ff; 1T90-11 to 15). The court took exception to petitioner's response to his ruling. (1T90-16 to 18). Petitioner's reaction was a non-verbal physical reaction which the judge characterized as petitioner "sitting there shaking [his] head, smiling and being disrespectful." (1T90-23 to 24). The judge warned petitioner that further display of disapproval with the court's rulings would result in incarceration.

Immediately following a short recess, petitioner apologized to the judge, explaining that his response was a "human"

reaction and assuring the judge that he meant no disrespect. The judge responded: "Put it behind us and forget about it." (1T91-18 to 24). Pre-trial hearings consumed the remainder of the first day.

The second day of pre-trial proceedings opened with each attorney presenting arguments on the admissibility of the victim's identification, after which the judge ruled against the defendant. (2T2-2 to 15-2). Following this, petitioner sought permission to call a psychologist as an expert to testify to the underlying lack of reliability of the polygraph tests. (2T15-3 to 19-4). The judge stated his desire to think about the request, but indicated that his initial response was negative. (2T19-5 to 14). The rest of the day was spent picking a jury. (2T19-17ff).

Following the selection of the jury, but before the jury was sworn and out of

its presence, petitioner moved for a mistrial, pursuant to State v. Gilmore, 103 N.J. 508 (1986), alleging that the prosecutor had used his peremptory challenges systematically to exclude black women from the jury. (2T121-3 to 12). In the course of denying the Gilmore motion, the judge suggested that the motion was untimely despite the fact that it was made before the jury was sworn, as explicitly required by Gilmore. (2T128-3 to 5). The judge abruptly interrupted his ruling to criticize petitioner's physical reaction to the court's statement, accusing: "You laughed, you rolled your head, you threw yourself back in your seat." (2T128-7 to 9). As with the incident the day before, the judge's outburst was prompted solely by petitioner's physical reaction to the judge's ruling.

Petitioner immediately protested that

the judge's characterization was not accurate. (2T128-10 to 11). Other persons present in the courtroom at the time, including the court reporter and the judge's own court clerk, have since attested in affidavits entered to supplement the appellate record that, as far as they were able to observe, petitioner did not throw himself back in his chair, laugh, or utter any sound prior to being held in contempt. (231a-239a)

Before giving petitioner an opportunity to be heard as to either guilt or punishment, the judge found petitioner in contempt and released the jury, thereby terminating the proceeding:

THE COURT: I find you in contempt of court. You'll be able to respond right now. I declare that this jury will be released. (2T128-13 to 15).

At that point, the judge released the jury, read from a state court opinion on contempt and again declared "I find you in

contempt. You may be heard before I pass sentence." (2T128-16 to 129-19).

Only after the judge had already decided the question of guilt did he allow petitioner to speak. Petitioner stressed that his actions were only a "human" reaction to his disappointment with the court's rulings and that he intended no disrespect. Petitioner's remarks also reflected a strong disagreement with the judge's characterization of his conduct. (2T129-21 to 131-13). Nothing in the contemporaneous record indicates that petitioner spoke in anything but a respectful tone:

MR. DANIELS: Judge, I'm a human being. I respond. I have shown no disrespect. I cannot help but be a human being.

I have been in this courtroom now since Tuesday. Every single decision has gone against me. The Court has stood there and in my opinion, most respectfully, has done nothing other than act as a second Prosecutor throughout these proceedings.

I have not at any time shown any

disrespect to the Court. I have reacted like a human being. I was disappointed with the Court's responses, with the Court's decisions during the course of these proceedings. My response to it was not yelling and screaming, not raising my voice, not screwing up my face, not jumping up and down, not showing any disrespect to any member of this courtroom, of this staff or to your Honor.

I am a human being. I was disappointed. I sat back in my chair as I have been sitting back in my chair and I lowered my head and I rubbed my eyes. That is all that I did.

I think that if we put on anybody in this courtroom right now that they would testify that I did nothing that was disrespectful to the Court. I did nothing other than sit back in my chair, put my head down and cover my eyes when the Court ruled that the objection in the Gilmore application was an application that was not timely made. The language could not be clearer. It must be done before the jury is sworn.

The application was made before the jury was sworn. The Court, in my view, was bending over backwards to find a way not to even hear the motion, although the motion was timely made.

THE COURT: Don't raise your voice.

MR. DANIELS: I'm sorry. I am obviously human and angry. I'm trying to show the most respect that I can for this Court.

I did not engage in any conduct which by any stretch of the imagination can be deemed contemptuous.

In fact, eyewitnesses to the proceedings have since attested, in affidavits admitted by the Appellate Division to supplement the record, that petitioner's remarks in his own defense though vigorous, were neither sarcastic nor disrespectful. (236a) Even the prosecutor has attested that although he considered petitioner's initial comment as "confrontational", petitioner "argued his point vigorously but no more so than I had seen other attorneys do in the past." (233a)

The judge asked petitioner if he wanted to call any witnesses. Wishing to marshal a defense, petitioner asked for time to collect his thoughts. Although the underlying trial was over, this

request was denied. The judge pressed petitioner: "Respond now. Do you wish to call any witnesses or anybody who saw what you did?" Petitioner asked to consult with an attorney. That too was refused. Not having any time to prepare his defense or consult with counsel, and being denied the opportunity to speak to any prospective witnesses, there was no other evidence petitioner could have offered in his defense. (2T132-9 to 19).

The judge again found that petitioner had laughed and pronounced sentence: "I find you in contempt of Court and I sentence you to two days in the County Jail and a \$500 fine, which will be carried out immediately." (2T133-6 to 8). At no point in the contemporaneous record did the judge find that petitioner through his actions had obstructed or disrupted the proceeding,² nor did the judge

2. The judge never cited petitioner for contempt for the March 18, 1986 exchange.

consider the aggravating and mitigating factors, as required by New Jersey law, prior to sentencing.

On March 24, 1986, five days later, the judge issued a Supplemental Order of Contempt, which dramatically embellished on, and in many respects contradicted, the contemporaneous record. (209a) Thus, while the judge had indicated on March 18th only that petitioner had shaken his head and smiled, the judge characterized petitioner's conduct that day as "consist[ing] of various expressions of disrespect during the reading of an opinion, including shaking his head, laughing and rolling his eyes and head to

In fact, on that day, as previously noted, the judge accepted petitioner's apology and explanation.

The judge mentioned the March 18th exchange in a supplemental order but again did not find petitioner in contempt for that exchange. Rather, the judge characterized the first incident as a "warning" that the March 19th incident was to be viewed "in light of." (221a)

express his disapproval and scorn."

(209a). Also for the first time, the judge characterized petitioner's tone of voice as "sarcastic" (id. ¶¶ 4-5), an accusation that petitioner had not been able to address at the time. Similarly, for the first time with regard to the March 19, 1986 incident, the judge again accused petitioner in the supplemental order of employing a "contemptuous", "sarcastic", and "disrespectful" tone of voice. (Id. ¶¶ 12, 15, 16 and 21).

In addition, for the first time, the judge baldly stated that petitioner's conduct had been "disruptive to the proceedings of the Court". (Id. ¶ 20). Finally, the judge, also for the first time, addressed his responsibilities as to sentencing and claimed to have weighed aggravating and mitigating factors as to sentencing at the hearing. The judge then

stated that he found the aggravating factors outweighed the mitigating factors, even though he "assumed" that every mitigating factor was applicable to petitioner. (Id. ¶23).

The Opinion of the New Jersey Supreme Court

The New Jersey Supreme Court affirmed petitioner's summary contempt conviction for a single fleeting grimace³ of frustration in response to one of many rulings in the course of two days of pre-trial argument in a serious and hotly

3. The trial judge suggested in his supplemental order, that a few comments made by petitioner in addressing the warning by the judge on March 18, 1986 and trying to defend himself the next day were contemptuous or contributed to the finding of contempt. However, the New Jersey Supreme Court determined that petitioner's "objectionable conduct was nonverbal". (App. 35a-36a). In reviewing a finding of contempt, "the question is not upon what evidence the trial judge could find petitioner guilty but upon what evidence the trial judge did find petitioner guilty." Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) (emphasis in original).

contested criminal case. The Appellate Division had held, by a divided court, that the United States Constitution does not restrict the substantive scope of the state's contempt power. App. at 151a-152a. The state Supreme Court, affirming the appellate court's decision, interpreted the state's judicial contempt power⁴ as authorizing summary punishment for conduct that has "the capacity to obstruct the administration of justice." App. at 25a, 52a.⁵ In addition to endorsing the use of

4. N.J.S.A. 2A:10-1(a) defines contempt as: "Misbehavior of any person in the actual presence of the court."

5. The New Jersey Supreme Court in Daniels described the contempt power alternatively as proscribing:

any act which is calculated to or tends to embarrass, hinder, impede, frustrate or obstruct the court in the administration of justice, or which is calculated to or has the effect of lessening its authority or its dignity; or which interferes with or prejudices parties during the course of litigation, or which otherwise tends to bring the authority and administration of the law into

summary procedures to punish such unobstructive behavior, the state court ignored the due process need for a plenary hearing to resolve a genuine factual dispute as to the nature of the facial gestures at issue. Finally, the court held that there is no federal constitutional right to counsel in a summary contempt proceeding, even where actual imprisonment is imposed.

disrepute or disregard. In short, any conduct is contemptible which bespeaks of scorn or disdain for a court or its authority. (Citations omitted) (Emphasis added).

(App. at 48a-49a).

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES CRITICAL ISSUES CONCERNING THE CONSTITUTION'S LIMITATIONS ON THE SUBSTANTIVE SCOPE OF THE COURTS' CONTEMPT POWER AND THE CONSTITUTIONAL PROTECTION OF VIGOROUS ADVOCACY

It has been nearly two decades since this Court last considered the constitutional limitations on the power of contempt to punish an attorney or pro se litigant for advocative expression. See In re Little, 404 U.S. 553 (1972); In re McConnell, 370 U.S. 230, 233-34 (1962). Despite the holdings in those cases that the summary contempt power is limited, respectively, to punishing imminent threats of obstruction or actual obstructions of the administration of justice, both these standards have been widely disregarded by state courts, including the court below.

There is a substantial split of authority among both state courts of last

resort and federal circuits as to the constitutional confines of the contempt power.⁶ Indeed, a majority of state statutes define contempt more broadly than actual obstruction of justice, or even imminent threat of obstruction, and a great number of states have failed to narrow their contempt laws to these constitutional tolerances by authoritative judicial construction.⁷ These open-ended

6. See, e.g., Weiss v. Burr, 484 F.2d 973, 982 (9th Cir. 1973) (state prosecutor's conduct measured by standard of "significant, imminent threats to fair administration of justice"); Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978) (applying actual obstruction standard to contempt of criminal defense attorney in state court proceeding); State v. Harper, 297 S.C. 257, 376 S.E.2d 272, 274 (1989) (actual obstruction standard); Ex parte Krupps, 712 S.W.2d 144, 150 (Tex. Ct. App. 1986), cert. denied, 479 U.S. 1102 (1987) ("criminal contempt is not restricted to conduct that obstructs or tends to obstruct the proper administration of justice."); and note 7, and accompanying text, infra (applying standards broader than imminent threat test).

7. See, e.g., Cal. Penal Code. §166 (West 1988); Mo. Ann. Stat. §476.110 (1987); N.Y. Stat. Ann. Art. 19, §750 (McKinney 1988); Minn. Stat. Ann. §588.01 (1988);

definitions of contempt, such as the "capacity" to interfere with the administration of justice, announced by the court below, make it extremely difficult to know before the fact, except in the most obvious instances, whether an attorney's conduct is punishable. Moreover, the expansiveness and inherent vagueness of such unbridled standards delegate an unacceptable level of discretion to trial judges, fostering arbitrary and discriminatory application.⁸

Mont. Rev. Codes Ann. §45-7-309 (1989); Neb. Rev. Stat. §25-2121 (1989); N.C. Gen. Stat. §5A-11 (1986); Ore. Rev. Stat. §33.010 (1983); S.D. Codified Laws Ann. §16-15-2 (1987); Utah Code Ann. §78-32-3 (1987); Wis. Stat. Ann. §785.01 (West 1981).

In addition, the laws of many states only grant the authority to the courts to punish conduct as contempt but make no effort even to define the offense. See, e.g., Colo. Rev. Stat. 10-1-104 (1978 Repl. Vol. 8); Fla. Stat. Ann. 900.04 (West 1984); Ill. Rev. Stat. ch. 38, §§1-3 (1989); R.I. Gen. Laws Ann. §§8-6-1 (1985); Tex. Govt. Code Ann. §21.002 (Vernon 1988); Vt. Stat. Ann. tit. 12, §§121-23.

8. This Court and others have repeatedly

In essence, the substantive scope of the contempt power is governed largely by the personal sensibilities of state trial judges, who too frequently run roughshod over attorneys' first amendment rights and the sixth amendment rights of their clients to the vigorous representation of counsel.⁹

recognized the inherent vagueness even of the constitutionally permissible standards used to define contemptuous conduct. See, e.g., Bridges v. California, 314 U.S. 252, 260 (1941) (acknowledging that the contempt power is "based on a common law concept of the most general and undefined nature."); Green v. United States, 356 U.S. 165, 200 (1958) (Black, J., dissenting) (contempt is the offense "with the most ill-defined and elastic contours in our law."); United States v. Seale, 461 F.2d 345, 369 (7th Cir. 1972) ("Obstruction [of the judicial process] is an elusive concept which does not lend itself to general statements.").

9. Indeed, there is considerable consensus that trial judges even in those jurisdictions that employ the actual obstruction standard, including the federal courts, have generally overreached in their exercise of the contempt power. See, e.g., Kuhns, The Summary Contempt Power: A Critique and a New Perspective, 88 Yale L.J. 39, 76 (1978); Harris v. United States, 382 U.S. 162 (1965). This is borne out by the unusually high

Furthermore, even under proper constitutional standards, the highest courts of other states also have upheld contempt convictions for the similarly unobstructive conduct of counsel in the representation of their clients' cases. Most recently, the Supreme Court of Connecticut affirmed the contempt conviction of an attorney who criticized, as "totally outrageous," a very substantial prison sentence that had just been imposed on his client, because "the authority and dignity of the court [was] immediately imperil[ed]." See In re Dodson, 214 Conn. 344, 359 (1990).¹⁰

It is critical, therefore, that this Court address this expansive problem

reversal rates in summary contempt cases. See p. 58-59, infra.

10. The undersigned has been advised by counsel for the defendant in that case that a Petition for Certiorari will be timely filed with this Court.

existing throughout the country to ensure the protection of federal constitutional rights in state courts. It is equally essential that the bench and bar have appropriate guidance as to the limits of the contempt power to punish advocacy undertaken in good faith. For excessive use of the contempt power is inevitably self-defeating; it deters the zealous advocacy of adversaries upon which our judicial system primarily relies to expose the truth and achieve justice.

**A. THE DEFINITION OF CONTEMPT AS
ANNOUNCED BY THE NEW JERSEY SUPREME
COURT IS UNCONSTITUTIONALLY OVERBROAD**

The Court has recognized that the contempt power can infringe three sets of constitutional guarantees: the first amendment freedoms and procedural due process rights of the contemnor, and the litigant's right to effective counsel and zealous advocacy protected or mandated by

the sixth amendment and due process guarantees of the fourteenth amendment. This Court has steadfastly insisted that the judicial contempt power must be limited to "the least possible power adequate to the end proposed", See, e.g., In re Michael, 326 U.S. 224, 227 (1945); In re McConnell, supra at 233-34, a constraint which has been uniformly interpreted by this Court to restrict both the substantive scope of contempt, McConnell, supra; Michael, supra at 227, and the procedures used to try the contempt. Harris v. United States, 382 U.S. 162, 165 (1965).

Beginning with Bridges v. California, 314 U.S. 252 (1941), this Court has consistently reversed contempt convictions for out-of-court speech critical of the conduct of judges. In all of these, the Court has held that the first amendment

prohibits exercise of the contempt power to punish extrajudicial speech unless the substantive evil threatened "is extremely serious and the degree of imminence extremely high", or in other words, unless such speech rises to the level of a clear and present danger. Id. at 263. See also, Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947).. Expression in a courtroom is entitled to the same first amendment protection. Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) (per curiam) (reversing state court contempt conviction of witness who described assailant as "chicken shit", because expletive failed to "constitute an imminent threat to the administration of justice.").

This Court has imposed the most stringent restrictions on the contempt power to protect the vigor of advocacy. In In re McConnell, supra, the Court

recognized that the question whether an attorney's conduct constitutes an obstruction must be viewed in light of a lawyer's role in representing his client. After being instructed by the trial judge to refrain from asking certain questions, McConnell persisted in asserting his right to ask the questions and announced that he "propose[d] to do so unless some bailiff stops us", for which he was held in contempt. Id. at 232.

This Court reversed the conviction because McConnell's repeated insistence that he be allowed to ask the questions at issue was nothing more than advocacy undertaken in good faith:

The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

Id. at 236.

In McConnell, the Court was reviewing a contempt conviction based upon the federal contempt statute, which defines contempt as an actual obstruction of the administration of justice.¹¹ In In re Little, supra, this Court extended its substantive limitations on the contempt power to protect arguments made before a jury in a state court proceeding. In Little, a pro se criminal defendant was held in contempt for arguing in his closing to the jury that he was a political prisoner and accusing the court of prejudice against him. The Court reversed, concluding that:

The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely likely, threat to the administration of justice. (citation omitted).

Id. at 555. The Court relied explicitly

11. See note 12 infra.

upon McConnell in determining that, under the Constitution, a pro se defendant, was "clearly entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's cause." Id.

Although it is clear that the imminent threat of obstruction standard marks the minimum protection of the Constitution against the contempt power, there remains some need to clarify whether the full extent of the constitutional limit is governed by the actual obstruction standard.¹² The few federal

12. In Bridges, the Court noted that its decisions applying the clear-and-present danger test "do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights." 314 U.S. at 263. Bridges also noted that the actual obstruction standard, defining contempt in the federal statute, 28 U.S.C.A. §385 (presently 18 U.S.C. §401), viewed in its historical context, [indicates] a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as

and state courts to have explicitly considered whether the obstruction standard set forth in McConnell is a constitutional limitation, have reached divergent conclusions.¹³ See, note 6 supra. Nevertheless, even under the imminent threat test, New Jersey's contempt statute, interpreted by the

commands the breach of which cannot be tolerated. Id.
314 U.S. at 267.

13. In fact, in the context of contempt, the actual obstruction and imminent threat standards reflect identical constitutional concerns, and should produce comparable results. See Raveson, Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, 65 Wash.L.Rev. ____ (July, 1990). Numerous Circuits, deciding cases under the federal contempt statute, therefore, have relied upon the Supreme Court's treatment in Little of the actual obstruction standard and the imminent threat test for contempt as functional equivalents. See, e.g., United States ex rel. Robson v. Oliver, 470 F.2d 10, 14 (7th Cir. 1972); United States v. Lumumba, 794 F.2d 806, 808 (2d Cir. 1986); Matter of Contempt of Greenberg, 849 F.2d 1251, 1255 (9th Cir. 1988); Gordon v. United States, 592 F.2d 1215, 1217 (1st Cir. 1979).

state's highest court to permit punishment for conduct that merely has the "capacity" or "tendency" to obstruct justice, and the statutes of the great number of states that similarly define contempt, proscribe a substantial amount of constitutionally protected activity, including valued advocacy, and are therefore unconstitutionally overbroad on their face.

The essence of the clear and present danger or imminent threat test is that the immediacy of the harm threatened by certain behavior is so near to a consummated injury that the behavior has the quality of a punishable attempt to bring about the harm. Nothing could be more antithetical to the Constitution's reverence for free expression, and for the sixth amendment rights of criminal defendants implicated in this Court's

cases protecting advocacy from the contempt power, than for a court of law to punish conduct based on the speculative nature of the danger within the grasp of the capacity or tendency standard.

Indeed, in Bridges v. California, supra, this Court already struck down, as violative of the first amendment, the power of a judge to punish extrajudicial expression as contempt on a finding of "an inherent tendency" or "reasonable tendency" to obstruct the orderly administration of justice in a pending case, 314 U.S. at 223. These standards were even more restrictive than a mere capacity to obstruct.

Under the actual obstruction standard, the overbreadth of the opinion below is even more pronounced. It is essential to prevent state courts from trammeling the constitutionally protected rights of expression and effective

representation of counsel that lie at the heart of our adversary system. This Court should invalidate the definition of contempt used by New Jersey and so many other states, and settle the constitutional limits on the contempt power.

B. PETITIONER'S MOMENTARY GRIMACE OF FRUSTRATION IN RESPONSE TO THE TRIAL COURT'S RULING FAILED, AS A MATTER OF LAW, TO CONSTITUTE CONTEMPT

In determining whether conduct amounts to contempt, this Court made it clear in Bridges, McConnell and Little that the contempt power does not extend so far as to undermine an attorney's obligation to vigorously represent his client, and must be restrained from violating fundamental rights of expression and representation. This Court's constitutional limitations on the contempt power also contemplate that judges will

not be overly sensitive and wield the power to punish minor affronts that do not obstruct the administration of justice.

In Craig v. Harney, supra, this Court reversed contempt convictions imposed for a series of published editorials that were intemperate and unfairly critical of a judge in a pending matter. The Court ruled that "a judge may not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him....'" 331 U.S. at 376 (citation omitted). The Court explained:

[T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.

Id. Accord In re Little, 404 U.S. at 555.

Cf. Offut v. United States, 348 U.S. 11, 14 (1954) (noting that a judge's power to hold in contempt is "totally unrelated to his personal sensibilities," and that

judge has an obligation to avoid "unwittingly identifying offense to self with obstruction to law...").

The fundamental necessity of proceeding with a trial justifies application of the contempt power to prevent obstructions and disruptions. But where nothing more than personal discourtesy or irritating conduct is involved, it should not be punished when it falls short of interfering with the nature of the trial. McConnell and Little clearly reject disrespect and discourtesy as independent grounds for contempt. Mr. McConnell's threatened disobedience of the court's order in unequivocal and confrontational terms involved an affront to the court's dignity which would certainly have been punishable had disrespect been an independent basis for contempt, or had the Supreme Court envisioned any easy correspondence between

affront and obstruction. By itself, McConnell's constitutionally mandated tolerance of conduct more disrespectful and willfully defiant of the court's authority than petitioner's transient gesture of disagreement with the judge, requires reversal of his conviction here. Indeed, not a single federal case upholds a contempt conviction for conduct as inadvertent and unobstructive as petitioner's.

Minor excesses of advocacy and momentary lapses of decorum are not contemptuous; contempt cannot begin exactly where the limits of proper advocacy end. Occasional excesses are the inevitable byproduct of encouraging the most vigorous permissible advocacy that drives our system of justice. If judges, based on individual biases or notions of decorum, can demand from attorneys the

kind of exquisite control necessary to avoid fleeting and trivial excesses, attorneys could protect themselves from contempt citations only by steering clear of the outermost bounds of proper advocacy.

Therefore, even where a specific excess, such as petitioner's facial expression, might not be considered to be condonable advocacy, the vigorousness of advocacy is critical to our system of justice. That vigorousness, mandated by the sixth amendment, cf. Anders v. California, 386 U.S. 738, 744 (1967) ("fair process can only be attained where counsel acts in the role of an active advocate"), can be preserved only if we permit the expression of advocacy in which such excesses inadvertently arise. Analogously, because "erroneous statement is inevitable in free debate", this Court has found it necessary to protect the

vigorousness of expression by mandating the "actual malice" rather than mere falsehood standard in defamation actions, in order to neutralize the chilling effect of possible liability for inadvertent misstatements. New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964). Adequate protection of the zealousness of trial advocacy requires that a similar buffer zone be fashioned around in-court expression that is valuable to the realization of justice, in order to insulate it from the contempt power. See Raveson, Advocacy and Contempt: Ensuring Adequate Breathing Room for Advocacy, 65 Wash. L. Rev. ____ (Oct. 1990).

The court below concluded that "lawyers [are required] to display a courteous and respectful attitude ... towards the court...." App. at 66a. But, if petitioner's momentary shudder of

disappointment or disagreement with a critical ruling, made outside the presence of the jury, can justify the imposition of criminal penalties, the delicacy of etiquette will have displaced the rigors of advocacy in our system of justice. In these circumstances, even the very respect that the trial judge sought to command by holding petitioner in contempt can only be undermined.

II. THE OPINION BELOW, UPHOLDING THE SUMMARY IMPOSITION OF IMPRISONMENT TO PUNISH A MINOR LAPSE OF DECORUM, ABOUT WHICH A GENUINE FACTUAL DISPUTE EXISTED, CONTRADICTS THIS COURT'S CASES AND IMPLEMENTS AN UNCONSTITUTIONAL STANDARD

The opinion below essentially authorized the use of summary procedures whenever,

an attorney's conduct in the actual presence of the court has the capacity to undermine the court's authority and to interfere with or obstruct the orderly administration of justice.

App. at 28a. The New Jersey Supreme Court's decision endorses a standard for the imposition of summary punishment that is even less stringent than the constitutional limitations on the contempt power in plenary proceedings.¹⁴ See Point

14. Although the court below noted that summary procedures are permissible only where "immediate punishment is essential to prevent demoralization of the court's authority before the public." App. at 28a-29a, it explicitly equated such exigency with the circumstances of what it considered to be "[the] narrow exception to due process requirements", quoted above. Id.

I, supra. Moreover, the state court's opinion is wholly inconsistent with this Court's prior cases justifying and limiting the use of summary proceedings to punish contempt.

This Court has relied on two independent justifications for the instantaneous imposition of criminal contempt sanctions.¹⁵ First, immediate punishment without the delay inevitably caused by plenary proceedings is necessary to punish serious disruptions of the court's business and to vindicate the courts' dignity or authority. See, e.g., United States v. Wilson, 421 U.S. 309, 316 (1975). Second, because the contemptuous acts occur in sight of the judge, a hearing may not be necessary to adjudicate

15. In Bloom v. Illinois, 391 U.S. 194, 201 (1968), this Court determined that "[c]riminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both."

the facts. See, e.g., Cooke v. United States, 267 U.S. 517, 534-36 (1925).

These justifications serve simultaneously as limitations on the contempt power: unless both conditions are present, proceeding summarily violates due process.

However, it is natural (as reflected in the opinion below), that once a judge determines there is an overriding necessity for summary punishment, little consideration is given to the question whether petitioner would have benefited from particular procedural safeguards. Conversely, the rationale that a judge's personal observation of allegedly contumacious conduct obviates the need for notice and a hearing too frequently discourages careful consideration of whether the necessity for summary action actually exists.

This Court has previously set the

ends of the spectrum of the kind of necessity which permits the immediate imposition of sanctions. See, United States v. Wilson, 421 U.S. 309 (1975) (upholding summary contempt convictions of trial witnesses for refusal to testify); Taylor v. Hayes, 418 U.S. 488 (1974) (attorney summarily held in contempt at conclusion of trial for conduct during trial entitled, as matter of due process, to notice and opportunity to be heard); Harris v. United States, 382 U.S. 162 (1965) (notice and hearing required under Fed. R. Crim. P. 42(b) before imposing contempt sanctions against recalcitrant grand jury witness). However, this Court has not identified with precision the dividing line that marks the limit of the power to proceed summarily. Nor has the Court considered circumstances in which a reasonable factual dispute may require a plenary hearing despite the fact that the

allegedly contemptuous behavior occurred in the presence of the judge. This case provides the Court with an appropriate and compelling factual setting for delineating with far greater precision the constitutionally required degree of process due in contempt adjudications.

A. There Was No Necessity in This Case For the Imposition of Summary Punishment

Whatever the constitutional limit on the definition of contempt generally, this Court has repeatedly explained that only the necessity of responding instantly to an actual obstruction excuses full compliance with the Constitution's command for due process. See, In re McConnell, supra at 233-34; In re Michael, supra at 227; Ex parte Hudgings, 249 U.S. 378, 382 (1919). In all of these cases the Court was reviewing contempt convictions arising under the federal obstruction standard.

Although there was no need for the Court to reach the constitutional issue, all of these decisions explicitly articulate the obstruction standard as a constitutional limitation and reveal that the Court was reading the federal statute in the light of its constitutional underpinning. This Court should take this opportunity to impose this most basic guarantee of due process as a constitutional limitation on the state courts' contempt power. See, e.g., Spruell v. Jarvis, 654 F.2d 1090, 1094 (5th Cir. 1981) (reversing state court's use of summary proceedings because defendant's "conduct cannot be said to have amounted to an obstruction of the orderly administration of the judicial process."); Wolfe v. Coleman, 681 F.2d 1302, 1306 (11th Cir. 1982) (affirming use of summary proceedings on standard of intentional obstruction of ongoing court

proceedings).

Even assuming that petitioner's physical gestures constituted an actual obstruction, they surely were not so threatening as to trigger the compelling need to dispense with all of the procedural protections developed over centuries and deemed fundamental to our system of justice, in order to preserve the trial court's ability to administer justice. As the appellate courts below noted, petitioner's conduct caused no severe harm to the judicial system, App. at 179a, and [t]he facts of this case ... disclose the kind of incident that might occur any day in a courtroom. App. at 6a. The immediate infliction of criminal penalties by a judge who simultaneously acts as grand jury, prosecutor, sole witness, fact finder, and frequently the perceived victim of the alleged contempt, is such an extraordinary anomaly in the

law that it has been permitted by this Court only where there is a compelling need for an immediate remedy. See Harris v. United States, supra at 164-66. Its use to punish nonverbal expressions to which the trial judge took personal affront is entirely alien to this Court's development of the law.

B. A Hearing Was Indispensable To Resolve a Reasonable Factual Dispute and to Determine Whether Petitioner Acted With Wrongful Intent

However urgent the court's need to respond instantly to behavior that is truly obstructive, the only justification for permitting a judge to proceed summarily is that having witnessed the events in question, it is not necessary to hold an evidentiary hearing to determine what occurred. Even where the conduct in question is unambiguous language captured in the contemporaneous record, courts must be on guard against the understandable tendency to confuse a desire for efficiency, in the face of a real need for instant vindication of the court's authority, with the ability to find facts fairly without a hearing. For it is not simply the judge's presence as a witness that excuses the need for a trial. Rather, there is no need for a hearing where the judge is a witness, only in the

absence of a genuine issue of fact. See Panico v. United States, 375 U.S. 29, 30 (1963) (per curiam) (reversing summary contempt conviction because defendant entitled to hearing on question of his criminal responsibility).

But where, as here, the trial court was faced with the difficulty of determining whether facial gestures, which are inherently ambiguous, were made willfully and with the intent to obstruct or demonstrate disrespect¹⁶; petitioner denied the judge's description of his physical expressions; and offered a good-faith explanation that he intended no

16. As the dissenting judge in the Appellate Division in this case explained, a court must be cognizant of the fact that persons may make facial grimaces and other gestures unwittingly, especially when they are under emotional stress. Therefore, it may be more difficult than in a case involving another form of contempt for a court to determine whether a facial expression or gesture is made willfully with an intention to disrupt or to cause disrespect for the court. (196a)

disrespect; the clear need for vital evidence to be provided by witnesses in the courtroom other than the judge made conviction by summary process wholly untenable.¹⁷ Indeed, the affidavits accepted by the appellate court to supplement the record, of other witnesses in the courtroom materially contradicting the trial judge's characterization of petitioner's behavior, demonstrate not only that there was an obvious need for an evidentiary hearing but that the judge's reliance solely on his own perceptions in fact resulted in faulty findings.

In essence, the decision below

17. Although the trial court asked petitioner if he wished to call any witnesses during the summary proceeding, the court refused to allow him to speak to prospective witnesses before calling them. This specious opportunity must be deemed a denial of the right to adduce testimony, rather than a waiver of that right. If counsel in any other criminal proceeding called witnesses without speaking to them first, it would surely be tantamount to malpractice.

permits the trial judge to take judicial notice of what occurred in his court, and of the intent of the alleged contemnor, even where those facts are reasonably in dispute.¹⁸ Even in the anomalous arena of a contempt proceeding, surely the determination as a matter of law that in the face of conflicting evidence the judge could not have misperceived,

18. The court below prefaced its opinion with the representation that it would accept the version of the facts set forth in petitioner's briefs, App. at 6a, and made note of the affidavits filed with the appellate court attesting that other witnesses in the courtroom, including the court reporter and the judge's court clerk observed, in contradiction to the judge's findings, that petitioner never threw himself back in his chair, laughed, or uttered any sound prior to being held in contempt, nor sounded sarcastic or disrespectful. App. at 14a. Despite all this, the court below concluded that, "we must deal with the record as we have it", id., ignoring the fact that these affidavits were made part of the record. The court noted further that petitioner, "continued to maintain that he had done nothing to offend the dignity of the court. But the court saw and heard the conduct of defendant." App. at 63a.

misinterpreted, or incorrectly remembered the events in the courtroom, fails to provide the constitutional quantum of process due.¹⁹ See Kuhns, supra, 88 Yale

19. Because a summary contempt proceeding provides so few guarantees of fundamental fairness, the detachment of the judge assumes even greater than ordinary importance. See, e.g., Taylor v. Hayes, 418 U.S. 488, 501 (1974) (holding due process violated in summary contempt disposition where judge demonstrated "such a likelihood of bias or appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interest of the accused."). This is particularly so, where as here, a reasonable question is raised as to the accuracy of the judge's findings of fact.

Evidence of the judge's inability to try petitioner impartially is extensive. There was a mounting display of antagonism by the judge toward petitioner. The judge took great personal offense at mild physical gestures of frustration. He was ready with a state court contempt opinion on the bench. His reaction was instantaneous and vehement, including finding petitioner in contempt twice and releasing the jury to end the trial prior to permitting him to address the charge; refusing petitioner a moment to collect his thoughts or talk to prospective witnesses in the courtroom before addressing the court; imposing a prison sentence without any consideration of aggravating and mitigating circumstances as required by state law, which was reversed by the appellate court as an

L.J. at 49-50 (challenging judge's ability to make accurate findings of what occurred and mens rea of alleged contemnor without evidentiary hearing); Note, Criminal Law - Contempt - Conduct of Attorney During Course of Trial, 1971 Wis. L.Rev. 329, 347-48 (defendant's intent may be impossible to establish without hearing).

Finally, this Court has been sensitive to the need for expanding due process protections as the magnitude of the liberty interest and the risk of error in the fact-finding process increase. See Morrissey v. Brewer, 408 U.S. 471, 489 (1972). The Court should extend those standards to the area of contempt to determine that here, the custodial sentence imposed and the cumulative impact of the impediments to due process, if not

abuse of discretion; and refusing to stay the sentence pending appeal of the conviction.

the individual deficiencies, themselves, made the kind of fundamental fairness mandated by Morrissey impossible in a summary proceeding.²⁰

III. THIS COURT SHOULD RESOLVE A CONFLICT BETWEEN THE STATES AS TO WHETHER THE FEDERAL CONSTITUTION ENTITLES A PERSON TO THE REPRESENTATION OF COUNSEL BEFORE BEING IMPRISONED SUMMARILY FOR CONTEMPT

This Court has never had occasion to

20. The New Jersey Supreme Court did note that because the trial in the instant case had been terminated, the need for immediate punishment was less pressing. App. at 63a. Moreover, the court below found that because the trial court sentenced petitioner to jail, summary procedures failed to afford the process due. App. at 63a-64a. However, despite these pronouncements, despite recognition by the court below that "the need for reliability was heightened in this case, because the attorney's objectionable conduct was nonverbal, and the record does not so easily lend itself to validating the judge's factual findings", App. at 35a-36a, and despite the fact that petitioner actually served time in jail, the state Supreme Court inexplicably concluded that reversal of petitioner's conviction was not necessary because he had "not suffered a consequence of magnitude by virtue of the appellate [court's invalidation of the jail term]." App. at 62a.

determine whether the fundamental right to counsel in all prosecutions which result in imprisonment for any term, established in Argersinger v. Hamlin, 407 U.S. 25 (1972), applies to an individual actually imprisoned for summary contempt.²¹ The New Jersey Supreme Court's blanket holding that the constitutional right to obtain counsel upon request is inapplicable in such circumstances is representative of one side of a substantial split of authority among the federal Circuits and the states, including several state courts of last resort.²²

21. Although the appellate court stayed petitioner's custodial sentence pending appeal and ultimately reversed it, he actually served a portion of that sentence. Therefore, the right to counsel issue is not moot, because petitioner was actually imprisoned as a result of having been convicted without representation.

22. Compare, Johnson v. United States, 344 F.2d 401, 411 (5th Cir. 1965) (failure to afford contemnor opportunity to consult with counsel before being summarily convicted of criminal contempt violated due process); United States v. Sun Kung Kang, 468 F.2d 1368, 1369 (9th Cir. 1972)

Even where a compelling need exists
to proceed summarily, the denial of

(indigent contemnor entitled to appointed counsel before being summarily imprisoned for civil contempt under 28 U.S.C. §1826, which authorizes summary punishment) (n.b. although the court's opinion does not indicate whether the contempt was summarily imposed, I have been advised by counsel for the contemnor that it was); Commonwealth v. Abrams, 461 Pa. 327, 328, 336 A.2d 308, 309 (1975) (finding constitutional right to counsel for contemnors actually imprisoned); Pitts v. State, 421 A.2d 901, 906 (Supreme Ct. Del. 1980) (same with respect to specific case before the court); People v. Lucero, 196 Colo. 276, 283-84, 584 P.2d 1208, 1214 (Colo. Supreme Ct. 1978) (right to counsel for contemnor summarily imprisoned for civil contempt; error harmless); with United States v. Baldwin, 770 F.2d 1550, 1553-54 (11th Cir. 1985) (summarily convicted contemnor not entitled to right to counsel); Mann v. Hendrian, 871 F.2d 51, 52 (7th Cir. 1989) (same) (dictum); United States v. Anderson, 553 F.2d 1154, 1155 (8th Cir. 1977) (same) (dictum); Ciraolo v. Madigan, 443 F.2d 314, 319 (9th Cir. 1971) (same) (dictum); State v. Case, 100 N.M. 173, 178, 667 P.2d 978, 983 (N.M. Ct. App. 1983), aff'd after rem. 103 N.M. 574, 711 P.2d 19 (N.M. App. 1985) (denying right to counsel in summary contempt proceeding); Saunders v. State, 319 So.2d 118, 125 (Fla. App. 1975) (same); Skolnick v. Indiana, 388 N.E.2d 1156, 1164-65 (Ct. App. 1979) (same).

counsel is constitutionally tolerable only to the extent that the judge's observation of the allegedly contemptuous conduct would make such representation unlikely to have an appreciable impact on the contempt adjudication. However, even if the judge's perceptions of the events and his factfinding are unerring, there remains an overarching need for legal argument as to whether the conduct is contemptuous, whether the contemnor acted with the requisite intent, and, ultimately, as to sentencing. See Mempa v. Rhay, 389 U.S. 128 (1967) (extending criminal defendant's right to counsel to sentencing proceeding). Where an actual loss of liberty is summarily imposed, judicial efficiency at the expense of the right to have counsel address the court as to these crucial issues, comes at too great a price. Indeed, representation of counsel in this case might well have averted

petitioner's actual imprisonment, which the appellate court held to be an abuse of the trial judge's discretion.

The almost total reliance on the judge in a summary contempt hearing, who is acting under the perceived need to jail the contemnor instantly, rather than justifying the denial of counsel, only increases the necessity for representation to guarantee effective exercise of the contemnor's extremely limited opportunity to defend against the abusive or mistaken imposition of imprisonment.²³ See Kuhns, supra at 57-62 (arguing for absolute right to counsel of summarily imprisoned contemnor). This need could not be demonstrated more strikingly than by the

23. The importance of representation by counsel is not diminished, as the court below suggests, App. at 33a, because petitioner is himself an attorney. An attorney surprised by the sudden initiation of contempt proceedings is not likely to be an effective advocate on his own behalf.

extremely high reversal rate of summary contempt convictions. See N. Dorsen & L. Friedman, Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct 233-34 (1973). Nor could Argersinger's driving concern -- to protect against the "obsession for speedy dispositions, regardless of the fairness of the result", 407 U.S. 34, -- resonate with greater force than when a summarily convicted contemnor is rushed to prison.

CONCLUSION

The law of contempt as currently administered both in federal and state courts is extremely haphazard, resulting in serious violations of constitutional rights and substantial detriment to our system of justice itself. There is a compelling need for this Court to define the constitutional limitations on the contempt power and to clarify the procedure required in contempt proceedings to safeguard fundamental rights. For all the foregoing reasons, a Writ of Certiorari should be granted for review of the issues raised herein.

Respectfully submitted,

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89-1972⁽²⁾

No. 89-

Supreme Court, U.S.

FILED

JUN 18 1990

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

IN THE MATTER OF
JAMES B. DANIELS, an Attorney-at-Law of the
State of New Jersey,
Petitioner,
—v.—

SUPERIOR COURT OF THE STATE OF NEW JERSEY,
Respondent.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW JERSEY**

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IN THE MATTER OF JAMES B. DANIELS,
AN ATTORNEY-AT-LAW
OF THE STATE OF NEW JERSEY,
DEFENDANT-APPELLANT.

Argued May 3, 1988-Decided February 28,
1990.

Louis Raveson argued the cause for
appellant, James B. Daniels.

Richard W. Berg, Deputy Att. Gen.,
argued the cause for respondent, Superior
Court of New Jersey (Cary Edwards, Att.
Gen., attorney)..

Susan J. Abraham, Asst. Deputy Public
Defender, argued the cause for amicus
curiae, Office of the Public Defender
(Alfred A. Slocum, Public Defender,
attorney).

Eric Neisser, Legal Director, submitted
a letter brief on behalf of amicus curiae,

American Civ. Liberties Union of New Jersey (Edward Martone, Executive Director, attorney).

Morton Stavis submitted a brief on behalf of amicus curiae, Center for Constitutional Rights.

David A. Ruhnke submitted a brief on behalf of amicus curiae, Ass'n of Crim. Defense Lawyers of New Jersey (Ruhnke & Barrett, attorneys).

Alan I. Zegas submitted a brief on behalf of amicus curiae, New Jersey State Bar Ass'n.

Carl D. Poplar submitted a brief on behalf of amicus curiae, Trial Attys. of New Jersey (Poplar & Florio, attorneys).

PER CURIAM.

Justice Felix Frankfurter wrote, dissenting in Sacher v. United States, 343

U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952):

In administering the criminal law, judges wield the most awesome surgical instruments of society. A criminal trial, it has been well said, should have the atmosphere of the operating room. The presiding judge determines the atmosphere. He is not an umpire who enforces the rule of a game, or merely a moderator between contestants. If he is adequate to his functions, the moral authority which he radiates will impose the indispensable standards of dignity and austerity upon all those who participate in a criminal trial.

[Id. at 37-38, 72 S.Ct. at 468-469, 96 L.Ed. at 738].

This case tests the measure of the discharge of that responsibility by a

trial judge. Specifically, the question is whether a judge may summarily punish for contempt an attorney who mockingly laughed at the court's rulings in an open proceeding.

Authors Norman Dorsen and Leon Friedman quote Justice Frankfurter when noting that the conduct of a modern criminal trial demands of a judge three distinct leadership qualities. N. Dorsen & L. Friedman, Disorder in the Court: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct 192-93 (1973) [hereinafter Dorsen & Friedman]. Foremost, "a judge is, in the first place, a judge." Id. at 192. He or she is the reflective passive minister of justice neutrally resolving the questions of law and procedure involved in the matter. The

judge is next a "traffic policeman," required to keep the extraordinary sustained flow of criminal trials moving with all deliberate speed. Id. at 193. Third, the judge is the exemplar of justice. "He personifies the abstract elements of the legal process--the need for fairness, understanding, and evenhanded application of the law." Ibid.

This role is a demanding one for any trial judge, and it is not trite to observe that what distinguishes our legal system from all others is our unflinching insistence on the dignity of the American courtroom as the ultimate repository of our liberties. Hence, we are satisfied that the judge's nondelegable duty to "impose the indispensable standards of dignity and austerity upon all those who participate in a criminal trial," Sacher

v. United States, supra, 343 U.S. at 38, 72 S.Ct. at 469, 96 L.Ed. at 738, justifies the court's summary imposition of contempt on the attorney whose conduct threatened the dignity of that proceeding. We find, however, that although the attorney's conduct warranted censure, the procedures were not consonant with the imposition of loss of liberty. We hold that the Appellate Division correctly vacated the jail sentence.

I

The facts of this case are not particularly unusual. They disclose the kind of incident that might occur any day in a courtroom. For purposes of this appeal, we will accept the version of the facts set forth in attorney's briefs.

James B. Daniels, an attorney with the Office of the Public Defender in the

Union County region, represented a client in a criminal trial that began on March 18, 1986. During pretrial hearings, there was "long and passionate argument" over the admissibility of the results of certain polygraph (lie-detector) tests. Mr. Daniels moved to exclude the results of the State's lie-detector tests, or in the alternative to rebut the State's tests with expert testimony and/or the defendant's own lie-detector test results. The attorney had previously stipulated to the admissibility of the State's polygraph test and the inadmissibility of the defense test.¹ The court enforced the

¹ The attorney's brief recites that earlier, the client had taken a lie-detector test administered by a defense expert that demonstrated the client's innocence. Although Mr. Daniels sought to

stipulation.

have the State dismiss charges on the basis of that test, the State would agree to do so only if the results of the prosecution's polygraph test concurred. As a condition of that agreement, however, the State also demanded a stipulation to the admissibility of its test results should they prove inculpatory. That stipulation, which Mr. Daniels executed, also provided that the results of the defense polygraph were inadmissible. Mr. Daniels sought to have the stipulation voided because, he said, the extremely contradictory results of the two tests clearly demonstrated the unreliability and lack of any probative value of those tests.

Mr. Daniels then moved that the court take judicial notice of certain scholarly articles so that Mr. Daniels could educate the jury on what he considered to be the crucial evidence in the case. The court denied that motion too after considerable oral argument. Defendant states that at this point "the court took exception to Mr. Daniels' response to his ruling," a reaction that the judge characterized as Mr. Daniels "sitting there shaking [his] head, smiling and being disrespectful." The judge warned Mr. Daniels that further display of disapproval with the court's rulings would result in incarceration. The attorney responded orally to the judge's admonitions, but the record does not include any reference by the stenographer that Mr. Daniels rolled his

eyes or laughed aloud or employed a sarcastic tone in response to the court. Nor did the contemporaneous description of the event by the court indicate that Mr. Daniels did more than smile and shake his head in response to the original ruling.

Immediately following a short recess, the attorney apologized to the court, explaining that his reaction, shaking his head, was a "very human response" and assuring the court that he had intended no disrespect. The judge responded, "Put it behind us and forget about it." The remainder of the day was uneventful.

The second day of the pretrial proceedings opened with arguments on the admissibility of the victim's identification. Again the court ruled against the defendant. Following that

ruling, Mr. Daniels sought permission to call a psychologist as an expert to testify to the underlying lack of reliability in the lie-detector test. The judge stated that he wished to think about the request, but that his initial response was negative. Most of the day was spent picking the jury.

Following jury selection but before the jury was sworn, and out of its presence, defense counsel moved for a mistrial. He relied on State v. Gilmore, 199 N.J.Super. 389, 489 A.2d 1175 (App.Div.1985), aff'd, 103 N.J. 508, 511 A.2d 1150 (1986), alleging that the prosecutor had used his preemptory challenges systematically to exclude black women from the jury. Defendant emphasizes that in the course of denying the Gilmore

motion, the judge suggested that the motion was untimely despite the fact that it was made before the jury was sworn. The judge abruptly interrupted his ruling to criticize Mr. Daniels' reaction to the court's ruling, stating, "Put on the record right now, you laughed, you rolled your head, you threw yourself back on your seat." As with the incident the day before, the judge's reaction was prompted by Mr. Daniels' physical reaction to the judge's ruling, not by any statement the attorney made.

Mr. Daniels immediately protested that the judge's characterization was not accurate. Defendant asserts that "[b]efore giving Mr. Daniels an opportunity to be heard as to either guilt or punishment [the court] found Mr.

Daniels in contempt and released the jury, thereby terminating the proceeding." The court said: "I find you in contempt of court. You'll be able to respond right now. I declare that this jury will be released."

At that point the court discharged the jury. The court referred to the opinion of State v. Vasky, 203 N.J. Super. 91, 495 A.2d 1347 (App. Div. 1985) (detailing contempt powers), and then declared: "I find you in contempt. You may be heard before I pass sentence." Mr. Daniels stressed that his actions were only a "human" reaction to his disappointment with the court's rulings and that he intended no disrespect, and denied again the judge's characterization of his conduct. He said, "I did nothing

other than sit back in my chair, put by head down and cover my eyes when the Court ruled [against the Gilmore application]." He immediately objected further to the court's Gilmore ruling, and the judge responded, "Don't raise your voice." Defendant asserts that other persons present in the courtroom, including the court reporter and the judge's court clerk, later attested that as far as they were able to observe, Mr. Daniels did not throw himself back in his chair, laugh, or utter any sound prior to being held in contempt, nor did he sound sarcastic or disrespectful. However, we must deal with the record as we have it. The record discloses that Mr. Daniels was asked if he wished to call any witnesses. He declined. Mr. Daniels asked to consult

with an attorney. The court refused that request. Defendant states that he was denied the opportunity to prepare his defense. Having been denied the opportunity to speak to any prospective witnesses, he says that there was no other evidence that he could have offered in his defense.

Finding that Mr. Daniels had laughed at its rulings in open court, the court then found the defendant "in contempt of court," and proceeded to impose sentence. He said, "I find you in contempt of Court and I sentence you to two days in the county jail and a \$500 fine, which will be carried out immediately."

Defendant obtained a stay of imprisonment and of the fine. On March 24, 1986, five days later, the trial court

issued a supplemental order of contempt. That order, in defendant's view, both elaborates on and conflicts with the contemporaneous record. On appeal, the Appellate Division affirmed the judgment of contempt, but it vacated the sentence of confinement. In re Daniels, 219 N.J. Super. 550, 530 A.2d 1260 (1987). In that court's view, imprisonment was not an appropriate punishment, inasmuch as harm to the judicial system was not severe and the \$500 fine and rebuke in open court should have sufficient deterrent effect. Id. at 592, 530 A.2d 1260. One member dissented, finding no contempt as a matter of law, and suggesting an evidentiary hearing in another trial court. Id. at 592-93, 530 A.2d 1260 (Skillman, J.A.D., dissenting). Here, he emphasized, the

contemptuous conduct, consisting of facial expressions and gestures, was not "unambiguously set forth on the trial record." Id. at 598, 530 A.2d 1260. We granted defendant's appeal as of right under Rule 2:2-1(a)(2), and his petition for certification, 109 N.J. 496, 537 A.2d 1287 (1987).

II

A.

There can be no doubt of the existence of the summary power of contempt. We may draw on the useful expression of the doctrine found in Justice Handler's concurring opinion in In re Yengo, 84 N.J. 111, 130, 417 A.2d 533 (1980), cert. denied, 449 U.S. 1124, 101 S.Ct. 941, 67 L.Ed.2d 110 (1981).

[T]his case involves the

inherent contempt power of the judiciary to challenge and punish affronts to its authority. It has long been recognized that there are occasions when this inherent authority must be exercised both swiftly and summarily in order to ensure obedience to court orders and respect for court procedures. See In re Oliver, 333 U.S. 257, 274, 68 S.Ct. 499, 508, 92 L.Ed. 682, 695 (1948); Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767, 773 (1925); Ex parte Terry, 128 U.S. 289, 302-303, 9 S.Ct. 77, 79, 32 L.Ed. 405, 408 (1888). The summary contempt

power is integrally related to judicial self-preservation. State v. Zarafu, 35 N.J.Super. 177, 182 [113 A.2d 696] (App.Div.1955). "The sole credible basis for the summary contempt process is necessity, a need that the assigned role of the judiciary not be frustrated." In re Fair Lawn Education Ass'n, 63 N.J. 112, 114-115 [305 A.2d 72], (1973), cert. den., 414 U.S. 855, 94 S.Ct. 155, 38 L.Ed.2d 104 (1973); McAlister v. McAlister, 95 N.J.Super. 426, 440 [231 A.2d 394] (App.Div.1967). This judicial "power is as ancient as the courts to which it is

attached and 'as ancient as any other part of the common law.'" In re Caruba, 139 N.J.Eq. 404, 427 [51 A.2d 446] (Ch. 1947), aff'd 140 N.J.Eq. 563 [55 A.2d 289] (E. & A.1947), cert. den. 335 U.S. 846, 69 S.Ct. 69, 93 L.Ed. 396 (1948) (quoting Rex v. Almon, 97 Eng.Rep. 94, 99 (K.B.1765)). (footnote omitted).

The New Jersey Code of Criminal Justice, while abolishing common-law crimes, preserves this judicial power to punish for contempt. N.J.S.A. 2C:1-5(c). The power is further defined by statute, N.J.S.A. 2A:10-1 to -8, and in our Rules of court. Rule 1:10-1 provides, "Contempt in the actual presence of a judge may be adjudged summarily by the judge without

notice or order to show cause." The expressions "adjudged summarily" and "criminal contempt power" are familiar to judges and lawyers but may not be equally familiar to all others. Thus we explain. The phrase "contempt power" really means the power to punish, and in our society that means the power to fine or imprison one who has violated judicial authority. There are two strands to the contempt doctrine that are sometimes not easily separated in its fabric. One strand is "civil contempt"; the other is "criminal contempt." The labels that jurisdictions may place on the exercise of judicial power to punish are not significant. It is the substance that determines the outcome.

Civil contempt proceedings are

primarily coercive; criminal contempt proceedings are punitive. As the court explained in Gompers [v. Buck's Stove & Range Co.], 221 U.S. 418, 443, 31 S.Ct. 492, 498, 55 L.Ed. 797, 807 (1911)], "[t]he distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act) and doing an act forbidden (punished by imprisonment for a definite term) is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

[Hicks v. Feiock, 485 U.S. 624, 646, 108 S.Ct. 1423, 1437, 99 L.Ed.2d 721, 741 (1988).]

Failure to pay alimony is a familiar

example of the type of act cognizable in an action for civil contempt. Id. at 646, 108 S.Ct. at 1437, 99 L.Ed.2d at 741. One important indication of which contempt strand applies is whether the judgment inures to the benefit of another party to the proceeding, i.e., is compensatory in nature, or vindicates the authority of the court, as does a fixed court fine. Id. at 646, 108 S.Ct. at 1437, 99 L.Ed.2d at 741. Another indication is the type of sentence imposed. Civil sanction requires incarceration only until compliance with a court order, whereas criminal sanction requires a fixed term. Id. at 646, 108 S.Ct. at 1437, 99 L.Ed.2d at 741.

Our current court Rules do not use the term "civil contempt"; rather, we view the process as one of relief to litigants.

R. 1:10-5. Unlike criminal contempt, which can be initiated only by the court, civil contempt allows any litigant to invoke relief in aid of a judgment or order of a court. Those are not easy lines to draw in many cases, but this case is clearly one of criminal contempt. Daniels was not being imprisoned until he complied; he did not carry the "keys to the prison" in his pocket. See Hicks v. Feiock, supra, 485 U.S. at 646, 108 S.Ct. at 1437, 99 L.Ed.2d at 741. He was sanctioned for what he did.

B.

What makes this case so important to bench and bar is the exercise of "summary contempt power." What that means is that punishment is imposed without the familiar procedures that ordinarily attend the

criminal law.

The justification for that "extraordinary power to punish without the formalities required by the Bill of Rights for the prosecution of *** crimes generally, is that the necessities of the administration of justice require such summary dealings with obstructions to it. It is a mode of vindicating the majesty of law, in its active manifestation, against obstruction and outrage." Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11, 16 (1954). But the United States Supreme Court has observed that the outer limit of the contempt power is "the least possible power adequate to the end proposed." Hicks v. Feiock, supra, 485 U.S. at 637 n.8, 108 S.Ct. at 1432 n.8, 99 L.Ed.2d at 735 n.8 (quoting

Shillitani v. United States, 384 U.S. 364, 371, 86 S.Ct. 1531, 1536, 16 L.Ed.2d 622, 628 (1966); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231, 5 L.Ed. 242, 248 (1821)).

Concurring in the Court of Appeals judgment in United States v. Sacher, 182 F.2d 416, 455 (2d Cir.1950), aff'd, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952), Judge Jerome Frank observed:

Undeniably, to punish summarily for contempt--to charge and hold a man guilty of a crime without a trial--is, and should be, an extraordinary exception in a civilized legal system; ordinarily, in this country an accused person is constitutionally entitled to a

trial and before someone other than his accuser. But Congress and the Supreme Court have recognized one exception: The statute and the Rule (promulgated by the Supreme Court) explicitly authorize a trial judge to punish summarily--without a trial before another judge--conduct (a) which is contemptuous and (b) which the judge "saw and heard," it being "committed in the actual presence of the court." The validity of that statute or of that rule is not challenged here by anyone.

Time has not altered the significance of Judge Frank's remarks.

[1] This extraordinary power, then, should be exercised sparingly and only in the rarest of circumstances. When an attorney's conduct in the actual presence of the court has the capacity to undermine the court's authority and to interfere with or obstruct the orderly administration of justice, there can be no alternative but that a trial court assume responsibility to maintain order in the courtroom. This narrow exception to due-process requirements permits the imposition of sanctions only for "charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate

punishment is essential to prevent 'demoralization of the court's authority' before the public." In re Oliver, 333 U.S. 257, 275, 68 S.Ct. 499, 509, 92 L.Ed. 682, 695 (1948) (quoting Cooke v. United States, 267 U.S. 517, 536, 45 S.Ct. 390, 394, 69 L.Ed. 767, 773 (1925)). The classic case for instant action is Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888), in which an attorney, seeing his wife led from the courtroom by a United States Marshal, assaulted the marshal and was immediately held in contempt of court.

[2] Necessity not only justifies the summary contempt power, but also limits that power by defining both settings for its exercise and procedural safeguards. In re Fair Lawn Educ. Ass'n, 63 N.J. 112,

114-15, 305 A.2d 72 (1973). With few exceptions, every contempt calls for an explanation. In re Logan, 52 N.J. 475, 477, 246 A.2d 441 (1968). Thus, even in summary contempt proceedings against an attorney, the attorney should be informed of the charge and given an opportunity either to dispel any possible misunderstanding or to present any exculpatory facts that are not known to the court. The provision for de novo appellate review of summary contempt convictions is a fail-safe mechanism for assuring that the contempt power is not abused. In re Yengo, supra, 84 N.J. at 135, 417 A.2d 533 (Handler, J., concurring) (judicial appellate review is a "judicial failsafe against not only trial court abuse, but trial court

mistakes as well"); see N.J.S.A. 2A:10-3; R. 2:10-4 (authorizing review on facts as well as law); see, e.g., In re DeMarco, 224 N.J.Super. 105, 539 A.2d 1230 (App.Div.1988) (affirming contempt conviction after consideration de novo with independent findings).

[3] Within this narrow exception to due-process requirements, contempt in the face of the court, the guarantee of right to counsel ordinarily does not apply. In re Oliver, supra, 333 U.S. at 275, 68 S.Ct. at 509, 92 L.Ed. at 695. Defendant points out that the United States Supreme Court has ruled, based on sixth-amendment and due-process guarantees, that no one may be imprisoned for an offense if the party was denied the right to be represented by counsel at trial.

Argersinger v. Hamlin, 407 U.S. 25, 37, 92 S.Ct. 2006, 2012, 32 L.Ed.2d 530, 538 (1972). The United States Supreme Court has also established right to counsel in a juvenile-delinquency case where civil proceedings resulted in institutional commitment. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). We do not believe, however, that the guarantee of right to counsel limits the summary contempt power. Nor does our decision in Rodriguez v. Rosenblatt, 58 N.J. 281, 295, 277 A.2d 216 (1971) (requiring counsel for indigent defendant imprisoned or subjected to "other consequence of magnitude") mandate such limitation. Contempt proceedings are traditionally characterized as "sui generis,--neither civil actions nor prosecutions for

offenses." Myers v. United States, 264 U.S. 95, 103, 44 S.Ct. 272, 273, 68 L.Ed. 577, 579 (1924). We agree with the Appellate Division that, especially where the party is an experienced trial attorney, the Argersinger due-process rationale does not require extending the right to counsel in a summary contempt proceeding. 219 N.J.Super. at 581, 530 A.2d 1260.

C.

But whereas there is inherent in the court's power to punish contempts summarily some necessary diminishment of the ordinary "procedural due process accorded to the alleged contemnor," In re Yengo, supra, 84 N.J. at 122, 417 A.2d 533, we have always stressed that due process is a "dynamic concept," Callen v.

Sherman's, Inc., 92 N.J. 114, 136, 455 A.2d 1102 (1983), and that its "sense of fairness cannot be imprisoned in a crystal." Id. at 134, 455 A.2d 1102. The United States Supreme Court has developed, and we have emulated, New Jersey State Parole Bd. v. Byrne, 93 N.J. 192, 460 A.2d 103 (1983), a sliding scale for evaluation of due-process requirements depending on the nature of the liberty interest involved and the degree of reliability required in the fact-finding process. See Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484, 499 (1972) (parole revocation requires notice of charges, opportunity to present witnesses, and a "neutral and detached" hearing body). The greater the risk of error, the more the need for procedural

safeguards.

Moreover, as the interests affected and need for reliability of fact-finding increase, the due-process rights of the party increase. Whether due process may require a particular step in the decision-making process is judged under the familiar three-part standard of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The Mathews test considers three factors: (1) the private interest affected; (2) the risk of error and probable value of additional procedural safeguards; and (3) the government's interest. Id. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33.

The need for reliability was heightened in this case, because the attorney's objectionable conduct was

nonverbal, and the record does not so easily lend itself to validating the judge's factual findings. In many cases the record will clearly reveal the contemptuous conduct. See, e.g., In re DeMarco, supra, 224 N.J.Super. 105, 539 A.2d 1230 (transcripts disclose the insulting and demeaning conduct on the part of the attorney). And see Judge Hand's detailed recitation of facts plainly disclosed in the trial transcripts of United States v. Sacher, supra, 182 F.2d 416.

And there are some circumstances in which judge and lawyer may become embroiled in what may appear to be a personal confrontation, thus increasing the need for reliable fact-finding. The United States Supreme Court, in the

exercise of its supervisory power over federal courts and not in the exercise of a constitutional mandate, has ruled that in such circumstances the better practice is that

where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. [Offutt v. United States, supra, 348 U.S. at 14-15, 75 S.Ct. at 13-14, 99 L.Ed. at 16 (quoting Cooke v. United States, 267 U.S. 517, 539, 45

S.Ct. 390, 396, 69 L.Ed. 767,
775 (1925)).]

We have allowed the qualified exercise of judicial contempt power to imprison for violation of a court order, see In re Buehrer, 50 N.J. 501, 515, 236 A.2d 592 (1967), but required that "the summary power***be hemmed in by measures consistent with its mission"--there, a hearing before another judge.

Such procedures conform generally with the American Bar Association standards on use of the contempt power. See American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Judge's Role in Dealing with Trial Disruptions (May, 1971) reprinted in Dorsen & Friedman, supra, at 343-48. Those standards allow summary

punishment beyond censure when contemptuous conduct is willful or the contemnor has been warned against it, require notice of charges and opportunity to be heard before sentence; and require referral to another judge if the presiding judge contributed to the contempt or if his objectivity could reasonably be questioned. Ibid.

To this we would add a special note of concern when we deal with imprisonment. There is a difference between money and freedom. No one can deny that the loss of liberty, next to the loss of life, is the greatest deprivation that a free citizen may suffer. In addition, imprisonment poses an extraordinary threat to the person who is imprisoned, both of violence in the prison setting, see Newark Star-

Ledger, Jan. 17, 1990, at 36, col. 1 (man placed in an overcrowded county jail for traffic violations had his neck broken by another inmate), and the unknown and unanticipated reaction of the prisoner, see Hake v. Manchester Township, 98 N.J. 302, 486 A.2d 836 (1985). And, for an officer of the court, the indignity of imprisonment may be regarded as perhaps the greatest loss.

We agree that such procedures impose some burdens of administration, but we also agree with Justice Black, dissenting in Green v. United States, 356 U.S. 165, 216, 78 S.Ct. 632, 660, 2 L.Ed.2d 672, 706 (1958), that when examined in closer detail, the argument of necessity contains another theme--that it will be "faster and cheaper***. But [at least when

imprisonment is at stake] such trifling economics as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value."

III

How then do we apply these general principles to the myraid of instances in which a court may be called on to vindicate its authority and maintain order and dignity in the courtroom? The conduct may run the gamut from the obvious frontal assault on the system. Ex parte Terry, supra, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (lawyer who assaulted marshal); to the demeaning of the system, In re Yengo, supra, 84 N.J. 111, 417 A.2d 533 (lawyer

who cavalierly absented himself from a trial); the deception of the system, Kerr Steamship Co. v. Westhoff, 204 N.J.Super. 300, 498 A.2d 793 (Law Div. 1985), aff'd as modified, 215 N.J.Super. 301, 521 A.2d 1298 (App.Div.1987) (witness who lied blatantly before the court); the flouting of the system, In re Carton, 48 N.J. 9, 222 A.2d 92 (1966) (lawyer who disobeyed a lawful order of the court); and, finally, here, as in In re DeMarco, supra, 224 N.J.Super. 105, 539 A.2d 1230, to the degrading of the system by insult to the court.

We wish that we could write a program that would outline the procedure to be followed in each case. We must continue, however, to repose a sound measure of discretion in our judges. The degree of

procedure should in good measure accord with the judge's evaluation of the significance of the contempt on the system. Obviously, not every \$25 fine on an attorney late for a calendar call is the occasion for the exercise of a full panoply of procedural rights. But the cases provide sound measure to guide the choice of procedures. For example, in In re Yengo, supra, 84 N.J. at 111, 417 A.2d 533, the court waited for an opportune time in the trial to adjudicate the contempt, once the attorney had returned to the courtroom, and did so without interruption of the trial. At the hearing, the attorney offered an explanation of his unapproved absence, but the court found it unsatisfactory and imposed a \$500 fine. In In re DeMarco,

supra, 224 N.J.Super. 105, 539 A.2d 1230, the court informed the attorney after each incident that a hearing on his alleged contemptuous conduct would be held. At the hearing, held after conclusion of the trial, the attorney was represented by counsel. After hearing the attorney's explanation, the court imposed a \$500 fine.

[4] Some of the steps a court should follow, then, are:

(1) It should immediately evaluate the gravity of the misconduct and decide whether it should invoke its right, power, and duty to charge or adjudicate the contempt. Conduct that falls short of contempt may be handled informally, outside the structure of Rule 1:10, some matters by a rebuke in chambers, some by

reference to other disciplinary bodies. Conduct that amounts to contempt may require immediate action under Rule 1:10.

(2) Once the court has determined that it should exercise the contempt power, it should immediately inform the party that it considers the act contemptuous and afford the party an opportunity to retreat or explain the circumstances, and thus avoid, perhaps, any need for adjudication.

(3) Depending on the degree of the contempt, the court must evaluate whether it calls for immediate adjudication lest there be "demoralization of the court's authority" before the public. Cooke v. United States, 267 U.S. 517, 536, 45 S.Ct. 390, 394, 69 L.Ed. 767, 773 (1925). An example would be a witness or lawyer who

refuses a lawful order of the court to cease interruption or to refrain from insult or invective in the course of a trial.

(4) If immediate adjudication of such conduct is called for, the court must evaluate whether the record will adequately disclose the essence of the contempt. As noted supra at 57, 570 A.2d at 419, in most instances of invective the record will adequately describe the misconduct. Other misconduct may be less graphic and call for fuller fact-finding. We need not, however, magnify what is a self-evident offense, such as an obscene gesture, into a mega-trial.

(5) If the contempt involves personal insult to the court (as opposed to other personnel in the system, as in Ex parte

Terry, supra, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405, or in In re McAlevy, 94 N.J. 201, 463 A.2d 315 (1983)), the court should consider whether there is any appearance of personal confrontation or loss of objectivity that would require reference of the matter to another judge.

(6) Finally, if the conduct appears to be such that imprisonment may be warranted and immediate action is not essential to prevent demoralization of the court's authority before the public, or to assure continuity of proceedings, as in the case of a continually disruptive spectator, both a more formal charging process and reference to another judge for adjudication and sentence would ordinarily be required in order to accord due process. The charge should particularly

inform the party of the need to present evidence in mitigation, or, as here, to call the other witnesses in the courtroom to state their accounts of the event.

[5] Applying the foregoing principles to the facts of this case leads us to agree substantially with the reasoning of the dissenting member of the Appellate Division and the result of the majority. Surely, if the underlying conduct occurred as found, the judgment of contempt was warranted. Contempt

comprehends any act which is calculated to or tends to embarrass, hinder, impede, frustrate or obstruct the court in the administration of justice, or which is calculated to or has the effect of lessening its authority or its dignity; or which

interferes with or prejudices parties during the course of litigation, or which otherwise tends to bring the authority and administration of the law into disrepute or disregard. In short, any conduct is contemptible which bespeaks of scorn or disdain for a court or its authority. (Citations omitted).

[In re DeMarco, supra, 224 N.J.Super. at 116, 539 A.2d 1230 (quoting In re Callan, 122 N.J.Super. 479, 494, 300 A.2d 868 (Ch.Div.), aff'd, 126 N.J.Super. 103, 312 A.2d 881 (App.Div.1973), rev'd on other grounds, 66 N.J. 401, 331 A.2d 612 (1975)).]

The conduct occurred in the judge's

immediate presence, was witnessed by him, and was, if not "an open threat to the orderly procedure of the court,***a flagrant defiance of the person and presence of the judge before the public." Cooke v. United States, supra, 267 U.S. at 536, 45 S.Ct. at 394, 69 L.Ed. at 773; see also In re Stanley, 102 N.J. 244, 246-47, 507 A.2d 1168 (1986) (laughing and facial grimaces directed at judge part of contemptuous conduct).

[6] We agree with the Appellate Division that the fact that the judge used the words "I find you in contempt" before giving defendant the opportunity to speak did not abridge his right to be heard. 219 N.J.Super. at 577-78, 530 A.2d 1260. Of course, the accused is entitled to the presumption of innocence and his or her

guilt must be proven beyond a reasonable doubt. In re Buehrer, supra, 50 N.J. at 516, 236 A.2d 592. Yet the words themselves should not control where the one charged with contempt is actually permitted to respond, as Daniels was here. See Vasky, supra, 203 N.J.Super. at 100, 495 A.2d 1347. His guilt was not truly adjudged until after he had defended himself.

Defense counsel urges that "[l]awyers who lose their cool are not lawyers who intend to obstruct justice." We are satisfied that the Appellate Division adequately resolved the question of whether defendant's infraction was "knowing and willful and evidence[d] an intent to flout the authority of the Court." In re Mattera, 34 N.J. 259, 273,

168 A.2d 38 (1961). With respect to the question of intent, "the minimum standard is one of a voluntary action known by the actor to be wrongful or one that he reasonably should have been aware was wrongful." In re Dellinger, 461 F.2d 389, 400 (7th Cir.1972). Here the court had previously warned the attorney on the obstructive nature of the conduct, and we are satisfied that the conduct had the capacity to obstruct the administration of justice. To say that mocking gestures cannot obstruct the administration of justice is to ignore the essence of the judicial process of "sifting through conflicting versions of the facts to discover where the truth lies, and applying the correct legal principles to the facts as found. Under the best of

circumstances these tasks are difficult; without an orderly environment they can be rendered impossible." In re Vicenti, 92 N.J. 591, 603-04, 458 A.2d 1268 (1983).

Moreover, the threat was not remote. This is not a case in which a judge used contempt proceedings to punish for speech outside the courtroom critical of his rulings. See Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); see also Bloom v. Illinois, 391 U.S. 194, 202-04, 88 S.Ct. 1477, 1482-84, 20 L.Ed.2d 522, 529-30 (1968) (recounting impeachment and 1831 acquittal of federal district court judge James Peck, for imprisoning and disbarring lawyer who published criticism of judge's opinion in case on appeal, and subsequent statutory curtailment of contempt power).

[7] We can well understand the mounting frustrations that this attorney had faced in confronting scientific evidence that he believed to be unreliable. It helps to explain his reaction but does not excuse it. Still, before imposing a punishment of imprisonment for such conduct, we must take care that the process accords with the interests involved and must assure the reliability of the fact-finding. The ancient justification for contempt, namely, the necessity to prevent "demoralization of the court's authority" before the public, Cooke v. United States, supra, 267 U.S. at 536, 45 S.Ct. at 394, 69 L.Ed. at 773, cannot realistically be effectuated by the jailing of an attorney in the midst of a criminal trial. See

Sacher v. United States, supra, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (justifying delay in disposition of contempt proceedings until conclusion of trial). Hence, in most cases, a court may adjudge the contempt either at the end of trial, or, as in In re Yengo, supra, 84 N.J. 111, 417 A.2d 533, at an opportune recess in the trial. Although conclusion of a trial does not automatically require more than summary proceedings, it is an important factor in the choice of procedure. See United States v. Lummumba, 741 F.2d 12, 16 (2d Cir.1984). In this case the trial had been terminated. Because the proceedings involved imprisonment of the attorney, the procedures failed to afford the process due in such circumstances. No discredit is intended or due to the trial judge, who

followed prior precedent in proceeding as he did.

IV

During a particularly troublesome period of misconduct in American courtrooms, Professor Paul Freund eloquently summarized the pith of the problem:

In thinking of the disorders that have been taking place in courtrooms over the country, and the proper way to deal with them, I keep recalling a conversation in a plane leaving London a few years ago. My neighbor on the plane introduced himself as a Latvian who had settled in England by way of South Africa. When he learned

that I was a lawyer he recounted an item in the English press a week before, telling of a defendant who, on being invited to address the court before sentencing, proceeded to utter a tirade against the judge. At the end the judge adjourned court for twenty-four hours, saying that he did not trust himself to impose sentence at that time. My companion then said, in a deeply stirred, almost reverential tone, "Where else in the world could you find such justice!"

The right blend of firmness and forbearance, of respect for the dignity of one's office and

for the humanity of its
contemnors, is as difficult to
achieve as it is universally
moving when it occurs.

[Freund, "Contempt of Court,"

1 Human Rights 4, 4 (A.B.A.

Section of Individual Rights
and Responsibilities, 1970).]

This is the ideal to which we aspire. It
is not always easy to attain or maintain
in an era of congested court calendars.
Dignity and decorum are strained. But
that should not occasion an insult to the
court. And there is no inhibition of
advocacy here. As was said by Justice
Jackson, himself a great trial lawyer,
courts "will not equate contempt with
courage or insults with independence,"
Sacher v. United States, supra, 343 U.S.

at 13-14, 72 S.Ct. at 457-58, 96 L.Ed. at 726, but courts must "protect the processes of orderly trial, which is the supreme object of the lawyer's calling," id. at 14, 72 S.Ct. at 457, 96 L.Ed. at 726. Lawyers are officers of the court and ministers of justice, no less than the judge. As such they bear some of the same responsibility as a judge to conduct themselves with dignity, for the sake of maintaining the supreme importance of the court. See In re Carton, supra, 48 N.J. at 17-19, 222 A.2d 92 (citing Canon No. 1, Canons of Professional Ethics).

Our experience tells us that it will be the rarest occasion for a New Jersey court to be required to use the contempt power to impose substantial discipline on an attorney. When it comes to the

obligations of attorneys, we have made it clear that lawyers who turn a courtroom into theater will be on the outside looking in for a long time. See In re McAlevy, supra, 94 N.J. 201, 463 A.2d 315 (attorney suspended for discourteous conduct); In re Vicenti, supra, 92 N.J. 591, 458 A.2d 1268 (attorney suspended for, among other things, spoken attacks in the courtroom). A lawyer who mocks a judge's ruling violates the canons of our professions. He can be dealt with swiftly and surely.

But if a court believes that the affront to justice calls for the exercise of its contempt power, the procedures should accord with the degree of the interests involved and the need for reliable fact-finding. In most cases that

means that a court confronted with a mid-trial contempt will give immediate notice of intent to treat the conduct as contemptuous. The party may later retreat from or explain the apparent contempt. See In re Logan, supra, 52 N.J. 475, 246 A.2d 441.

Should it be necessary to adjudge the contempt when the party is exposed to a loss of liberty, the adjudication of the contempt should be made by another judge unless there is no other way to continue the trial. That adjudication can be on the basis of the record certified to that court, supplemented by any further oral or written submissions. Obviously, in such a proceeding the party charged would have a right to be represented by counsel.

Finally, in all contempt cases in

which the detachment of the court may reasonably be questioned, a hearing before another judge is desirable. See Mayberry v. Pennsylvania, 400 U.S. 455, 466, 91 S.Ct. 499, 505, 27 L.Ed.2d 532, 540 (1971) (remanding to a judge "other than the one reviled by the contemnor"). We emphasize, as did Justice Frankfurter in Offutt, supra, 348 U.S. at 14, 75 S.Ct. at 13, 99 L.Ed. at 16, that "justice must satisfy the appearance of justice."

We find in the circumstances of this case that the attorney has not suffered a consequence of magnitude by virtue of the appellate disposition. The adjudication of contempt is not an adjudication of criminal conduct on the part of the attorney. See In re Buehrer, supra, 50 N.J. at 518, 236 A.2d 592. Nor do we

believe that the record denotes a loss of detachment by the trial court sufficient to invalidate the adjudication. The court did not bang the gavel on counsel; rather, it terminated the proceedings that could no longer be conducted in an orderly fashion, and afforded defendant the right to be heard and, in essence, the right to retreat from the contempt. Defendant continued to maintain that he had done nothing to offend the dignity of the court. But the court saw and heard the conduct of defendant. Because the trial court may have anticipated the imposition of a jail term, as evidenced by the actual sentence, we would prefer that the matter have been heard by another judge. But we are satisfied that the Appellate Division adequately reviewed the record and made

independent findings of fact sufficient to sustain its sanction.

Thus far we have been spared in New Jersey, for the most part, the incivility that has begun to mark the practice of law elsewhere. See National Law Journal, Jan. 15, 1990, at 1, col. 3 (hardball, "Rambo-style" litigation tactics on the rise); New York Times, Aug. 5, 1988, at B5, col. 1 (many attorneys say litigation is war, advocating a "scorched earth" policy). These are the expressions of people who have undoubtedly never experienced the realities of which they speak, else they would not wish to import them into the practice of law. We have another vision of lawyers.

We recently had occasion to restate it.

One does not have to inhale the self-adulatory bombast or after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers.

[In re Vicenti, supra, 92 N.J. at 603, 458 A.2d 1268 (quoting Schwartz v. Board of Examiners, 353 U.S. 232, 247, 77 S.Ct. 752, 760, 1 L.Ed.2d 796, 806 (1957) (Frankfurter, J., concurring)).]

From a profession charged with such responsibilities, we expect always the truth-speaking and sense of honor embodied

in granite character. As applied to the conduct of lawyers, that translates into a requirement that "lawyers display a courteous and respectful attitude not only towards the court but towards opposing counsel, parties in the case, witnesses, court officers, clerks--in short, towards everyone and anyone who has anything to do with the legal process." Ibid.

The judgment of the Appellate Division is affirmed.

Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN join in this opinion.

For affirmance--7.

Opposed--None.

IN THE MATTER OF JAMES B. DANIELS,
AN ATTORNEY-AT-LAW
OF THE STATE OF NEW JERSEY,
DEFENDANT-APPELLANT.

Superior Court of New Jersey
Appellate Division

Argued March 24, 1987-Decided July 30,
1987.

Before Judges MICHELS, O'BRIEN and
SKILLMAN.

Louis S. Raveson, Assistant Public
Advocate, argued the cause for appellant,
James B. Daniels (Alfred A. Slocum, Public
Advocate, attorney; Louis S. Raveson and

Lance D. Cassak, Assistant Deputy Public Advocate, of counsel and on the brief).

Richard W. Berg, Deputy Attorney General, argued the cause for respondent, The Superior Court of New Jersey, State of New Jersey (W. Cary Edwards, Attorney General of New Jersey, attorney; Richard W. Berg, of counsel and on the brief).

Poplar & Florio submitted a brief on behalf of amicus curiae Trial Attorneys of New Jersey (Carl D. Poplar, of counsel and on the brief).

Ruhnke & Barrett submitted a brief on behalf of amicus curiae The Association of Criminal Defense Lawyers of New Jersey (David A. Ruhnke, of counsel and on the brief).

The opinion of the court was delivered by

MICHELS, P.J.A.D.

On March 19, 1986, following a

summary hearing, the Honorable Alfred J. Lechner, Jr. found defendant James B. Daniels, an attorney-at-law of the State of New Jersey, guilty of contempt in the presence of the court, sentenced him to two days in the Union County Jail and fined him \$500. Defendant appealed.

The events giving rise to the contempt conviction occurred during defendant's representation of Michael McMahon, whose trial for first degree robbery commenced on March 18, 1986. Defendant was employed by the Union County Region of the Office of the Public Defender and assigned as trial counsel for McMahon. Although defendant was held in contempt on March 19, 1986, the second day of pretrial hearings, a review of the proceedings on both March 18 and 19, 1986 and of certain events leading up to trial

is necessary to establish the context in which the allegedly contemptuous behavior occurred.

On January 14, 1986, Investigator John Stanton, an expert polygraphist in the Public Defender's Office, administered a polygraph examination to McMahon. Stanton informed defendant that McMahon passed the test "with flying colors," and, that in the ten years in which he had been involved in polygraph testing, no one who passed so convincingly had ever failed a subsequent examination. Based upon this assessment, defendant contacted the Prosecutor's Office to see if they would be willing to allow McMahon to take their polygraph test on a stipulated basis. Initially, the State was not amenable to this request; however, after persisting for several weeks and filing a formal

motion to attempt to compel the State to give a stipulated polygraph, defendant was able to convince the State to allow McMahon to be tested. Thus, knowingly, voluntarily and, at all times represented by counsel, McMahon entered into an agreement with the State which provided, among other things, that (1) irrespective of the outcome, the results of the polygraph test to be administered by Investigator Peter Brannon, a polygraph expert employed by the State, would be admissible on behalf of either side; (2) the results of any other polygraph examination would not be admissible unless covered by a separate stipulation, and (3) although the opposing party [McMahon] could cross-examine Brannon as to his personal qualifications or the details of the test which he administered, McMahon

could not introduce another polygraphist to refute Brannon's expert testimony.

After conducting an examination, Brannon concluded that McMahon was not telling the truth when he denied his involvement in the robbery with which he was charged. Brannon and Stanton then compared the tests that each had administered to McMahon. Although reaching opposite results concerning McMahon's complicity in the crime, they had used virtually identical equipment and questions, and both tests were conducted properly. Neither polygrapher could explain the divergence in the results.

At the March 18, 1986 hearing, the trial court heard argument on the defense motion to have the State's polygraph evidence excluded or, alternatively, to permit the results of Investigator

Stanton's test to be admitted into evidence. Preliminarily, defendant requested a Rule 8 hearing so that the trial court might reconsider the reliability of polygraph results in light of the information which had become available since the Supreme Court's decision in State v. McDavitt, 62 N.J. 36 (1972). Defendant maintained that the plethora of research since McDavitt has established the unreliability of polygraph examinations. In support of his position, defendant presented certain literature and was prepared to offer the testimony of Dr. Leonard Saxe, a Boston University professor who authored a 1983 congressionally commissioned study which concluded that there was no scientific basis for the validity or use of the polygraph test. Nonetheless, the trial

court denied the defense request for a Rule 8 hearing. Because McDavitt established that "polygraph results are admissible if they are the subject of a knowing, voluntary, unequivocal and reciprocal stipulation" and in the instant case the parties had such a stipulation, the trial court concluded that a Rule 8 hearing would serve no purpose.

Defendant proceeded to argue that enforcement of certain provisions of the stipulation would be violative of due process public policy and principles of fundamental fairness. The thrust of defendant's argument was that precluding the defense from introducing the results of the first polygraph test through its own expert would serve no legitimate purpose and would conceal half the story from the jury. Given the overriding

concern with the search for truth, defendant maintained that the trial court should repudiate those provisions of the stipulation which would result in a distortion of the evidence presented to the jury. After allowing a lengthy argument by defendant and the State's response thereto, the trial court explained in detail that the stipulation met the requirements of McDavitt, constituted a knowing and intelligent waiver of McMahon's Sixth Amendment rights to present evidence and expert testimony, and would therefore be enforced in its entirety in the interests of justice.

After the trial court rendered its decision, defendant inquired whether, in cross-examining the State's polygraphist, he would "be permitted to read the stipulation in its entirety, making

reference to the fact [that] he [Brannon] was aware that another test had been conducted." The trial court denied defendant's request and specifically ordered him not to refer directly or indirectly to the other polygraph examination. Defendant's attempt to pursue the matter further precipitated the following exchange:

THE COURT: I don't want to hear any further argument on it. I will not permit further argument on it. I gave you your chance earlier. It's over.

MR. DANIELS: I have not been able to argue this point.

THE COURT: I'm sorry. I asked you any other point on the stipulation. You said no. No further argument.

MR. DANIELS: Judge--

THE COURT: Mr. Daniels, did you hear me?

MR. DANIELS: Yes, sir, I must insist--

THE COURT: You will not get it.

MR. DANIELS: I have not been given an opportunity to argue this.

THE COURT: You will not get this.

MR. DANIELS: I must have misunderstood the Court with reference to--

THE COURT: We've been doing this for two hours. This hearing is over.

Furthermore, the trial court denied defendant's application to stay the proceedings to allow for an interlocutory appeal of the ruling.

Later in the same proceedings, defendant argued that, by its terms, the parties' stipulation would allow him to

question the State's polygraphist about the "critics of [the] polygraph and their concerns about [the] unreliability and invalidity of the test in general." To this end, defendant presented to the trial court numerous articles on the polygraph and requested, pursuant to Evid. R. 9(2)(e), that the court take judicial notice of those articles. Due to the controversy surrounding the reliability of the polygraph, the trial court opined that the writings were not the proper subject of judicial notice. However, the trial court agreed with the prosecutor that defendant could use these articles to cross-examine the State's expert if he recognized them as treatises or authorities in the field. Defendant presented additional argument on the matter which the trial court agreed to

consider over the lunch recess. However, upon reconvening the hearing, the trial court ruled that it would not take judicial notice of the articles.

Defendant requested to be heard on that ruling, and the trial court afforded him five minutes to present his views. After defendant argued why he believed the articles on the polygraph satisfied the requirements of Evid. R. 9(2)(e), the following colloquy took place:

THE COURT: So what? So what on all of this?

MR. DANIELS: So what, Judge?

THE COURT: That's exactly what I said. So what?

MR. DANIELS: There couldn't be anything more important. I have been denied the opportunity to bring in my experts to talk about this.

THE COURT: No, you haven't been denied. You went into a stipulation agreeing not to do that. You weren't denied anything.

MR. DANIELS: I am denied that. Okay? The Court has ruled. I have said in spite of my stipulation I have asked to do this and the Court refused to allow me to.

THE COURT: The answer is no, unequivocally, unalterably, no. Anything else on this point.

MR. DANIELS: I just want to make sure I understand the Court's ruling.

THE COURT: Oh, stop. Don't posture with me. Anything else on this point?

MR. DANIELS: No

After the trial court reiterated that it would not take judicial notice of the

articles and that defendant could refer to them only if the State's polygrapher recognized them as treatises, the trial court and defendant addressed one another in the following manner:

THE COURT: Mr. Daniels, I frankly don't care about your response but if you continue to do that, sir, I'm going to take appropriate action.

MR. DANIELS: Your Honor, go right ahead, take whatever appropriate action your Honor deems necessary.

THE COURT: For the record, Mr. Daniels, you're sitting there shaking your head, smiling, and being disrespectful. I'm telling you right now, you are close to the edge, sir. I frankly do not care what you think about my rulings. Should you manifest it outwardly in this

courtroom, I shall hold you in contempt and I shall put you in the County Jail. Thereafter I will adjourn the trial until you come out.

I am giving you fair warning. I will not put up with your antics. I do not want to hear a word from you again. When I say the argument is over you will sit down and be quiet. Do you understand me?

MR. DANIELS: You could not be clearer.

THE COURT: Be guided accordingly.
A recess ensued, after which defendant stated to the trial court:

I would just like to say that although clearly I was disappointed with the Court's ruling, I meant no disrespect to the Court. It was a very human response, I shook my head.

I apologize. I meant no disrespect. The trial court replied that they should "[p]ut it behind [them] and forget about it."

Following a Wade hearing, which was decided against McMahon, a jury was selected on March 19, 1986. After counsel for both sides had stated that the jury was satisfactory, but before the jurors were sworn, defendant moved for a mistrial based on the principles espoused in State v. Gilmore, 199 N.J. 389 (App.Div. 1985), aff'd 103 N.J. 508 (1986). In support of the motion, defendant maintained that four of the eight peremptory challenges exercised by the State were used to exclude black women. The State, however, argued that all four black women had relatives or close friends who had committed or were victims of crimes,

including murder. Therefore, the State was of the opinion that, despite their assertions to the contrary, these witnesses might have formed an opinion as to the criminal justice system. In rendering its decision, the trial court noted preliminarily that one of the four requirements under Gilmore is that there be a timely motion--one made prior to swearing the jury. Although not satisfied that this requirement had been met, the trial court began to rule upon the motion on the assumption that it was timely. However, the trial court stopped itself in mid-sentence and directed defendant to stand. The following then transpired:

MR. DANIELS: Yes, sir.

THE COURT: Put on the record right now, you laughed, you rolled your head, you threw yourself back in your

seat.

MR. DANIELS: Judge, I didn't, I did neither of those things, none of them, zero. And I'm tired of this kind of stuff.

THE COURT: I find you in contempt of court. You'll be able to respond right now. I declare that this jury will be released.

I find that in accordance with State v. Vasky, [203 N.J.Super. 91], decided June 24, 1985, Appellate number 2291-84-T5, the following: "A 'contempt' of court is a disobedience of the Court by acting in opposition to its authority, justice and dignity. It comprehends any act which is calculated to or tends to embarrass, hinder, impede, frustrate or obstruct the Court in the

administration of justice or which is calculated to or has the effect of lessening its authority or dignity; or which interferes with or prejudice[s] parties during the course of the litigation, or which tends otherwise to bring the authorities or administration of the law and [sic] into disrepute or disregard. In short, any conduct is contempt[i]ble which bespeaks off [sic] sworn or dis[d]ain for the authority of a Court or its authority in general.

"Even when a person commits contempt which directly insults the Court," in connection with such activity. [sic]

Now I will accord you an opportunity to show that you did not

possess at the time the requisite mens rea but this will be done at a summary hearing immediately.

I find that I warned you yesterday about your conduct in sitting in your seat, laughing, holding your head down and besmirching what is going on in this court. I find you in contempt.

You may be heard before I pass sentence.

I find you're laughing and smiling again.

MR. DANIELS: Judge, I am a human being. I respond. I have shown no disrespect. I cannot help but be a human being.

I have been in this courtroom now since Tuesday. Every single decision has gone against me. The Court has

stood there and in my opinion, most respectfully, has done nothing other than act as a second Prosecutor throughout these proceedings.

I have not at any time shown any disrespect to the Court. I have reacted like a human being. I was disappointed with the Court's responses, with the Court's decisions during the course of these proceedings. My response to it was not yelling and screaming, not raising my voice, not screwing up my face, not jumping up and down, not showing any disrespect to any member of this courtroom, of this staff or to your Honor.

I and [sic] a human being. I was disappointed. I sat back in my chair as I have been sitting back in my

chair and I lowered my head and I robbed [sic] my eyes. That is all that I did.

I think that if we put on anybody in this courtroom right now that they would testify that I did nothing that was disrespectful to the Court. I did nothing other than sit back in my chair, put my head down and cover my eyes when the Court ruled that the objection to this case was not--the objection in the Gilmore application was an application that was not timely made. The language could not be clearer. It must be done before the jury is sworn.

The application was made before the jury was sworn. The Court, in my view, was bending over backwards to find a way not to even hear the

motion, although the motion was timely made.

THE COURT: Don't raise your voice.

MR. DANIELS: I'm sorry. I am obviously human and angry. I'm trying to show the most respect that I can for this Court.

I did not engage in any conduct which by any stretch of the imagination can be deemed co[n]temptuous.

Your Honor and I have had disagreements. We will continue to have disagreements. That's the nature of the game. I am sorry that I don't sit here and thank the Court every time it rules against me. I am sorry that I don't sit here and thank the Court when it sends my client to prison. I don't see that as being my

job my responsibility or my function in this courtroom. My job, my function, my responsibility is to be the best advocate that I can for my client and I am going to do the damndest to try to do that.

The situations which Your Honor has made reference to have been situations--all of which have been outside the presence of the jury. I have not shown anything other than the most, utmost respect for the Court, for the system, for the entire process.

THE COURT: Do you wish to say anything further?

MR. DANIELS: No.

THE COURT: Do you wish to call any witnesses?

MR. DANIELS: May I have a few

moments, your Honor?

THE COURT: Respond now. Do you wish to call any witnesses of [sic] anybody who saw what you did?

MR. DANIELS: I would like to consult with an attorney.

THE COURT: Summary hearing right now. Do you want to call a witness?

MR. DANIELS: No.

THE COURT: All right. I find that you sat there and laughed. I find that response in the best light is disingenuous. I saw you sit back there and laugh.

I didn't even get a chance to put my full opinion on the record. I told you there were four criteria under Gilmore. I indicated to you that I didn't think it was a timely objection but even assuming that it

were, and giving you the benefit of the doubt, I was trying to go on to B, C and D. You interrupted by your contemptuous conduct.

I find you in contempt of Court and I sentence you to two days in the County Jail and a \$500 fine, which will be carried out immediately.

I will discharge the jury before we have this carried out.

Thereupon, the trial court discharged the jury and ordered that defendant be taken to the county jail.

Because the order of contempt presented for the trial court's signature on March 19, 1986 did not contain all the information required by R. 1:10-1, and, at that time, there was no secretarial assistance available to make decisions to the order, Judge Lechner entered a

supplemental order on March 24, 1986.

This order described defendant's conduct on March 18, 1986 as "expressions of disrespect," including "shaking his head, laughing, and rolling his eyes and head to express his disapproval and scorn."

Moreover, the order provided that when asked if he understood the trial court's warning that a repetition of such conduct would lead to a citation for contempt and his being incarcerated, defendant

"sarcastically responded that '[y]ou [the court] could not be clearer.'" Judge Lechner further stated in the order that defendant's disrespect was also manifest in his reply--"'[y]our Honor, go right ahead, take whatever appropriate actions your Honor deems necessary.'"--to another admonition by the court. According to Judge Lechner, the "inflection of voice

and sarcastic manner of delivery [of this statement] verbally confirmed the disrespect of Mr. Daniels evidenced just a few minutes earlier." Rather than responding to defendant's "dare," Judge Lechner averred that he tried to "defuse the situation." Subsequently, defendant apologized for his conduct.

Recounting the incidents of March 19, 1986, the order noted that when Judge Lechner was deciding the Gilmore motion, defendant "again reacted with seriously offensive and contemptuous conduct." On that occasion, defendant laughed, threw himself back into his chair, shook his head and covered his eyes. As a consequence, defendant was cited for contempt of court. Although acknowledging that Judge Lechner had stated several times that he "finds defendant in

contempt," the order explained that these expressions were "in effect a notification or charge of contempt of court. Mr. Daniels was not held in contempt ... until after he was given an opportunity to be heard with regard to his mens rea and sentencing." Defendant was afforded this opportunity, albeit at a summary hearing.

Defendant's response to the charge of contempt was characterized in the order as a "tirade." In fact, it was once necessary for the trial court to direct defendant to lower his voice. Although defendant apologized, he thereafter offended the trial court by stating in a disrespectful manner, "I'm trying to show the most respect that I can for this court' ... (emphasis as stated)." Moreover, in a contemptuous voice, defendant accused the court of being a

second prosecutor. Admitting to conduct which he had previously denied, defendant attributed his actions to being "human." As indicated in the order, the trial court found defendant's attempt to prove a lack of mens rea disingenuous.

Additionally, the order noted that although defendant maintained that anyone in the courtroom would confirm that he had done nothing disrespectful to the trial court, defendant refused to call any witnesses when given the opportunity to do so. According to Judge Lechner, this failure to call witnesses confirmed that no one could corroborate defendant's protestations of innocence. Defendant's conduct was willful, deliberate and disruptive and his comments "had the effect of lessening the dignity of the court." Finding defendant's conduct to be

"an open threat to the orderly procedure of the Court," Judge Lechner concluded that the "[i]mposition of a custodial sentence was required."

The order further stated that, although the record is silent in this regard, the trial court did in fact consider aggravating and mitigating factors before passing sentence. Although defendant did not address his comments to sentencing, the trial court assumed that all mitigating factors applied to him. Nonetheless, it concluded that the two aggravating factors "qualitatively outweighed all mitigating factors." The aggravating factors mentioned in the order were defendant's conduct and the need to deter him from similar actions in the future. Thus, "it was a balancing of the quality of [the] factors which required

the imposition of incarceration."

Finally, Judge Lechner noted in the order that on two separate occasions on March 19, 1986, a representative from the Office of the Public Defender came to see him in his chambers on behalf of defendant. Judge Lechner stated that he would vacate the jail sentence and reduce the find if defendant would apologize. However, when these offers were conveyed to him, defendant indicated that he was not interested in apologizing.

Having been granted leave of court, defendant supplemented the record with his affidavit of May 1, 1986. In his affidavit, defendant recounted a conversation he had with Thomas P. Simon, Esq., the prosecutor representing the State in State v. McMahon. According to defendant, Simon had stated that although

he saw defendant smiling and shaking his head disapprovingly, he did not hear defendant utter a sound prior to being held in contempt. The affidavit further indicates that Simon described defendant as having vigorously defended his position as many attorneys had done in the past. Likewise, the affidavit states that Judy Kollarik, the official court reporter assigned to Judge Lechner's courtroom on March 19, 1986, did not hear defendant say a word even though she was seated just a few feet from him. Defendant's affidavit states that Ms. Kollarik did see defendant lean back in his chair, put his hand to his forehead and shake his head in disagreement when the trial court began to rule against him on the Gilmore application.

The record was also supplemented with

the April 29, 1986 affidavit of James Tighe, the clerk assigned to Judge Lechner's courtroom at the time of the events in question. Although sitting just a few feet from defendant, Tighe stated that he did not hear defendant say anything prior to being held in contempt. Moreover, Tighe averred that when given an opportunity to be heard, defendant vigorously defended his position without being sarcastic or disrespectful in his manner or tone of voice.

The final affidavit supplementing the record was that of Assistant Prosecutor Simon dated June 2, 1986. Simon recounted how, on March 18, 1986, Judge Lechner stopped the proceedings to admonish defendant for being disrespectful and to warn him that any further actions of that nature would result in his being found in

contempt. Simon stated that during the Gilmore motion on March 19, 1986, he observed defendant sitting "in his chair, waving his hands, shaking his head, and making laughing gestures." Simon was not able to hear any laughter; however, he noted that audibility in the courtroom was poor because several windows were open and it was quite windy. According to Simon, when Judge Lechner accused defendant of repeating his conduct of the previous day, defendant "jumped out of his seat, waved his hand at the Court, and said he was doing none of those things, and he was tired of this kind of 'stuff.'" A confrontation in which defendant accused the trial court of being a second prosecutor culminated in defendant being found in contempt.

Furthermore, Simon asserted that by

taking his statements out of context, defendant's affidavit distorted the meaning of what Simon had said to defendant. Simon stated that he had told defendant that defendant was initially being confrontational with the judge, and that, after defendant calmed down, he argued his point vigorously. Simon opined that by omitting the first part of his comment, defendant's affidavit altered the meaning of what he had said.

Defendant seeks a reversal of his contempt conviction or, alternatively, a reversal and a remand for a hearing pursuant to R. 1:10-2. He seeks this relief on the following grounds set forth in his brief:

POINT I APPELLANT'S CONDUCT DID NOT CONSTITUTE CONTEMPT, AS A MATTER OF LAW.

A. The Tension Between The

Independence Of The Bar And The Contempt Power.

B. Appellant's Gestures And Physical Reaction To The Trial Judge's Rulings Did Not Disrupt Or Obstruct The Proceedings And Were Not So Flagrant As To Constitute Contempt.

1. The Requirement Of A Material Disruption.

2. Appellant's Conduct Did Not Rise To The Level of Contempt, Nor Did It Cause A Material Disruption In The Proceedings.

C. Appellant Lacked The Necessary Mens Rea To Support The Conviction For Contempt

POINT II UNDER THE CIRCUMSTANCES OF THIS CASE, THE COURT IMPROPERLY EMPLOYED SUMMARY PROCEDURES AND SHOULD HAVE ALLOWED APPELLANT A FULL HEARING ON THE CHARGE OF

CONTEMPT.

A. Summary Procedures Are Disfavored And Are To Be Used Only When Time Is Of The Essence.

B. Even Where Time Is Of The Essence, Other Circumstances In This Case Call For The Use Of R. 1:10-2 Procedures.

1. Because The Allegedly Contemptuous Behavior Constituted An Attack On The Judge's Rulings, The Contempt Charge Should Have Been Heard Pursuant to R. 1:10-2.

2. Summary Procedures Should Not Be Used Where Vital Evidence Can Be Provided By Persons Other Than The Judge.

3. Because The Trial Court Imposed A Sentence Of Incarceration, This Matter Should Have Been Heard

Pursuant to R. 1:10-2.

D. Conclusion: The Use of the Least Restrictive Alternative.

POINT III EVEN IF SUMMARY PROCEDURES UNDER R. 1:10-1 WERE PROPER, THE CONTEMPT ADJUDICATION WAS MARKED BY A NUMBER OF PROCEDURAL IRREGULARITIES THAT UNCONSTITUTIONALLY DENIED APPELLANT DUE PROCESS.

A. The Trial Judge Should Have Recused Himself And The Charge Of Contempt Should Have Been Heard By A Different Judge.

B. The Judge Denied Appellant His Right To Be Heard Prior To Finding Him In Contempt.

C. The Judge's Refusal To Allow Appellant To Consult With An Attorney Violated His Rights Under The United States And New Jersey Constitutions.

POINT IV EVEN IF APPELLANT'S CONDUCT
CONSTITUTED CONTEMPT, THIS MATTER MUST BE
REMANDED FOR A HEARING AS TO THE
APPROPRIATENESS OF THE SENTENCE.

[1,2] Our duty on an appeal of a
summary conviction for contempt is to try
the matter de novo on the trial record,
upon the law and the facts, towards the
end of adjudicating both guilt and
punishment. N.J.S.A. 2A:10-3 and R. 2:10-
4, In re Yengo, 84 N.J. 111, 135 (1980),
cert den., 449 U.S. 1124, 101 S.Ct. 941,
67 L.Ed.2d 110 (1981); In re Spann
Contempt, 183 N.J.Super. 62, 65
(App.Div.1982); In re Parsippany-Troy
Hills Ed. Ass'n, 140 N.J.Super. 354, 360
(App.Div.1975); In re Ed. Ass'n of
Passaic, Inc., 117 N.J.Super. 255, 259
(App.Div.1971), certif. den. 60 N.J. 198
(1972); Bd. of Ed. of Newark v. Newark

Teacher's Union, 114 N.J.Super. 306, 318 (App.Div.1971), certif. den. 58 N.J. 605 (1971), cert. den. 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267 (1971). "The only limitation on our power, beyond that applicable to the trial court, is that we may not impose a greater sentence than that which the trial court imposed." State v. Vasky, 203 N.J.Super. 91, 99 (App.Div.1985); Parsippany-Troy Hills Ed. Ass'n, supra, 140 N.J.Super. at 360.

Having studied the entire record in light of this obligation, we are in accord with the trial court's factual findings and legal conclusions and adopt them as our own. We find beyond a reasonable doubt that defendant's conduct constituted contempt in the presence of the court. In reaching this conclusion, we have considered the contentions set out above

and all the arguments advanced by defendant in support thereof and find that, with the sole exception of the issue of punishment, they are clearly without merit. R. 2:11-3(e)(2). Further comment, however, is appropriate with respect to some of the issues raised.

I.

THE PROPRIETY OF THE SUMMARY CONTEMPT

PROCEEDINGS UNDER R. 1:10-1

Defendant argues that resort to summary procedures under R. 1:10-1 was inappropriate. Alleging that the jury had been released and the trial ended prior to the onset of the contempt proceedings, defendant contends that there was no need for immediate action to insure the continuity of the trial. Since time was not of the essence, defendant maintains that in order to safeguard his due process

rights, the trial court should have used the "normal" procedures under R. 1:10-2. Defendant also challenges the use of a summary hearing on evidentiary grounds. He contends that his "good faith" explanation for his actions and the existence of factual disputes concerning this conduct necessitated a full hearing at which evidence from persons other than the judge could be adduced. Furthermore, defendant argues that the allegedly contemptuous conduct was a personal attack on the judge who took offense and lost all objectivity. Therefore, the charge of contempt should have been heard by another judge. Additionally, defendant asserts that because he was sentenced to imprisonment and because summary proceedings diminish one's due process rights, a balancing of the competing

interests dictates that the contempt charge should have been heard pursuant to R. 1:10-2. According to defendant, a R. 1:10-2 hearing is a least restrictive alternative, vis-a-vis the infringement of his constitutional rights, which should have been invoked in this case. Lastly, even if a summary hearing were justified, defendant claims that he was denied the right to be heard and the right to counsel. Consequently, he contends that "the proceeding below was fundamentally unfair and the finding of contempt must be reversed."

A.

Summary Proceedings Pursuant To R. 1:10-1
Were Justified

[3,4] Defendant's assertion that summary proceedings are appropriate only when time is of the essence is unsupported

by New Jersey case law. "Contempt in the actual presence of a judge may be adjudged summarily by the judge without notice or order to show cause." R. 1:10-1; Yengo, supra, 84 N.J. at 121; In re Contempt of Carton, 48 N.J. 9, 21 (1966); Vasky, supra, 203 N.J.Super. at 98; In re Hinsinger, 180 N.J.Super. 491, 495 (App.Div.1981). The power to punish summarily for contempts committed in the face of the court, "although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions." Ex parte Terry, 128 U.S. 289, 313, 9 S.Ct. 77, 83, 32 L.Ed. 405, 412 (1888). See also In re Contempt of Ungar, 160 N.J.Super. 322, 330 (App.Div.1978). The need to control the proceedings may compel swift action. See Carton, supra,

48 N.J. at 21. Not only does obedience to orders of the court, but any misbehavior which tends to impede the administration of justice may constitute a contempt. See Sarner v. Sarner, 28 N.J. 519, 524 (1959), app. diss. and cert. den., 359 U.S. 533, 79 S.Ct. 1137, 3 L.Ed.2d 1028 (1959).

This includes conduct of an attorney which tends to obstruct justice. See In re Logan, Jr., 52 N.J. 475 (1968). However, since the power to punish directly inevitably diminishes the procedural due process accorded the alleged contemnor, the power must be permitted only where necessary. See Harris v. United States, 382 U.S. 162, 165, 86 S.Ct. 352, 354, 15 L.Ed.2d 240, 242 (1965). See also Yengo, supra, 84 N.J. at 122.

In Yengo, for example, the attorney Yengo was held in contempt for taking a

trip to Bermuda during a complex gambling conspiracy trial in which his client was one of numerous defendants. Although Yengo had briefed one of his colleagues to proceed in his stead, Yengo's client had consented to this substitution of attorney and the trial proceeded as scheduled, Yengo was summarily found guilty of contempt and fined \$500 upon returning from Bermuda. We reversed and remanded, holding that Yengo's conduct constituted an indirect contempt requiring notice and hearing pursuant to R. 1:10-2 and R. 1:10-4. In re Yengo, 167 N.J.Super. 66, 70 (App.Div.1987). However, the Supreme Court disagreed. Finding that Yengo's unexcused absences and frivolous explanation therefore was a direct contempt, the Court reinstated the summary contempt conviction and \$500 fine. Thus,

despite the absence of any urgency for an expedited hearing, the trial court's resort to summary proceedings was upheld by our Supreme Court.

[5] Likewise, in Hinsinger, supra, defendant was cited for contempt for refusing to testify despite the trial court's instruction that he do so. Six days later, at a summary hearing conducted pursuant to R. 1:10-1, defendant was found guilty of contempt and sentenced to a six-month term in county jail. Although the need for immediate action due to defendant's refusal to testify had passed long before defendant's contempt hearing, we upheld the trial court's use of summary procedures. Hinsinger, like Yengo, refutes defendant's argument that, because time was not of the essence, the trial court erred in summarily trying him for

contempt.

Defendant also claims that there was a factual dispute as to the nature of his conduct and that the resolution of this controversy required a plenary hearing at which additional, crucial evidence could have been presented. To support his assertion that a dispute existed, defendant points to the purported discrepancies between the transcript of the proceedings and the trial court's "embellished" supplemental order. Similarly, defendant maintains that the trial court's account of what transpired conflicts with the recollection of others who were present in the courtroom. Because of these alleged inconsistencies and the fact that defendant's conduct consisted largely of silent, physical gestures, defendant argues that a R. 1:10-

2 hearing was necessary to elicit more testimony. Finally, defendant contends that his good faith explanation--that his actions were merely a human response--was another reason why a summary proceeding was improper.

Neither the facts of this case nor the law of contempt support the arguments advanced by defendant. Contrary to what defendant avers, there are no discrepancies between the trial transcript and the supplemental order of contempt. On March 18, 1986, the trial court noted that defendant was "sitting there shaking [his] head, smiling and being disrespectful." Likewise, on March 19, 1986, the trial court stated for the record that defendant "laughed ... rolled [his] head [and] threw [himself] back in [his] seat." Immediately before defendant

was given an opportunity to be heard, the trial court found that he was "laughing and smiling again." Although the supplemental order of March 24, 1986 is more detailed and frequently characterizes defendant's conduct and the manner in which he addressed the trial court as contemptuous, sarcastic and disrespectful, it does not conflict in any material respect with the transcript of the proceedings. Likewise, the affidavits of Tighe, Simon and Daniels basically accord with the events as recited in the supplemental order. The affidavits corroborate the trial court's description of defendant's actions and facial expressions; however, none of the affiants actually heard defendant laugh. Whether this fact is attributable to the difficulty in hearing caused by the open

courtroom window or the quietness of defendant's laughing gestures does not impact significantly on the outcome of this case. It merely suggests that if defendant's conduct was contumacious, it was not so because of its audibility. Thus, there was no dispute necessitating a full hearing at which testimony could be taken.

Moreover, where, as here, the contumacious conduct occurred entirely in the trial court's presence and calling witnesses would not bring to light any information beyond that which the judge had himself perceived, no purpose would be served by conducting a plenary hearing. As we stated in State v. Gonzalez, 134 N.J. Super. 472, 477 (App.Div.1975), aff'd as modified 69 N.J. 397 (1975):

All the conditions which justify

summary convictions for contempt during a trial were present here. Defendant's contemptuous conduct occurred in open court and was directly witnessed by the judge. Immediate treatment was necessary to preserve order and a deliberate atmosphere in the courtroom.

Although conceding that "defendant's alleged contempt was in the presence of the court and thus was subject to summary adjudication by the trial judge pursuant to R. 1:10-1," (at 592), our dissenting colleague concludes that certain ambiguities in the record warrant remanding this matter for an evidentiary hearing. In our view, such an approach is inconsistent and would unjustifiably undercut the summary power of contempt. Here, the trial court was exposed to all

of the conduct and language which resulted in the contempt citation and, therefore, was expressly authorized to try defendant summarily. In doing so, the trial court accorded defendant a right of allocution and an opportunity to call witnesses. Defendant declined to call any witnesses on his behalf; however, he later supplemented the record with his affidavit and that of one other observer. After carefully considering these affidavits and the one submitted by Assistant Prosecutor Simon, we cannot conclude that there was a conflict, the resolution of which required additional testimony. Moreover, even if, contrary to our conclusion, further testimony should have been elicited, the time for doing so was at the summary hearing. By choosing instead to rely upon the affidavits, defendant cannot transform

the nature of his actions into that of an indirect contempt and thereby secure a plenary hearing to which he was not entitled.

Additionally, defendant's argument that his good faith explanation warranted proceeding by order to show cause was considered and rejected by this court in Hinsinger, supra. There, a psychiatrist testifying on defendant's behalf at the summary contempt hearing opined that defendant's refusal to testify was attributable to "a 'factitious disorder' producing his mutism predicated on a clear underlying mental disorder." 180 N.J.Super. at 494. Relying upon Yengo, defendant in Hinsinger, contended that since an adequate explanation was offered for his conduct, the matter should have been tried by a different judge at a full

hearing.

In Hinsinger, we observed that Yengo does not stand for the proposition that whenever a legitimate explanation is offered a direct contempt becomes indirect and thus inappropriate for summary proceedings. We noted that in Yengo, the Supreme Court focused exclusively on whether an attorney's absence from court constituted a direct or indirect contempt. Explaining that a crucial element of that offense was the attorney's explanation which may refer to facts not before the court, the Yengo court held that the adequacy of the explanation would determine how the offense was to be categorized and thus whether summary procedures were justified. Noting that Yengo was inapplicable to that case, in which the contemptuous omission was the

witness' refusal to testify which occurred in the trial court's presence, we held that the trial court's resort to summary procedures was proper. Because almost every contempt calls for an explanation, we found that defendant's interpretation of Yengo would vitiate the summary contempt proceeding. Moreover, we concluded that that defendant's theory would:

violate the principle that the trial court must have inherent power to punish direct affronts to its authority swiftly, in order to ensure obedience to court orders and respect for the court. [180 N.J.Super. at 497].

[6] Here, too, defendant erroneously relies upon Yengo, in support of his claim that his good faith explanation required

that the charge of contempt be adjudicated at a plenary hearing. For the reasons expressed in Hinsinger, we reject this argument. Furthermore, it is extremely doubtful that defendant's explanation--that his conduct was simply a human reaction--would be deemed "adequate" according to any standard. Cf. State v. Sax, 139 N.J.Super. 157, 159 (App.Div.1976), certif. den. 70 N.J. 525 (1976) (defendant held in contempt despite his excuse that his abusive comment and gutter language was due to frustration). Nor does the possibility that the trial court erred in ruling on the Gilmore motion render defendant's conduct or explanation therefore acceptable. As the Supreme Court stated in Carton, supra:

There must be no defiance of a court,
least of all by one of its officers.

It is no excuse that the trial judge may be in error. Courts of appeal exist to hear such claims. One who is dissatisfied with the action of a court must obtain a stay or obey the order. He may not ignore it. [48 N.J. at 16].

[7] Another ground on which defendant challenges the appropriateness of summary proceedings in this case is that the trial court had become so personally embroiled in the matter that it was incapable of rendering a dispassionate decision. According to defendant, his "allegedly contemptuous conduct--expressions of disapproval with the judge's ruling--is one of the most direct and personal attacks on the judge, challenging not only his authority but his intellect as well." As evidence of the trial court's

indignance and loss of objectivity, defendant claims that the trial court committed sundry errors in the course of the contempt proceedings. Thus, defendant maintains that this case "should have been heard by another judge pursuant to R. 1:10-2."

For several reasons, this argument is entitled to little credence.

Preliminarily, one should note the inconsistency in defendant's position: while arguing that the alleged contumacious acts were so offensive as to require Judge Lechner to recuse himself, defendant also asserts that his conduct did not constitute contempt as a matter of law. Furthermore, defendant's argument is refuted by several reported decisions in which judges who were the target of conduct clearly more offensive than

defendant's were permitted to preside at summary contempt proceedings. See, e.g., Vasky, supra, 203 N.J.Super. at 97 (although not the basis on which the trial court found defendant in contempt, the trial court heard defendant call it a "scumbag"); Gonzalez, supra, 134 N.J.Super. at 474 (defendant uttered vulgarities concerning all involved in the proceedings then directed additional scurrilous remarks to the court). But see Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767, 768, 775 (1925) (defendant's letter to the trial court stating that the judge was not "big enough to overcome ... personal prejudice" and accusing the judge of being influenced by extraneous, slanderous remarks required that a different judge hear the case on remand). In addition, the trial court did

not commit the errors attributed to it by defendant. Thus, defendant's claim that the circumstances of this case warranted Judge Lechner to recuse himself is unfounded.

[8] Also unavailing is defendant's assertion that, because he faced incarceration and summary proceedings diminish one's due process rights, the least restrictive alternative of a R. 1:10-2 hearing should have been employed. In analyzing claims under the state constitution, our Supreme Court has "considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). See Right to Choose v. Byrne, 91 N.J. 287, 308-309 (1982). In light of the

panoply of safeguards afforded an individual in a criminal contempt proceeding, and the compelling need for judges to be able immediately to quell disrespectful conduct committed in their presence, the factors set forth in Greenberg unquestionably point to upholding the use of summary contempt procedures in appropriate circumstances. In both the court rules it has adopted and numerous decisions, our Supreme Court has determined that the circumstances of a direct contempt, such as the one at issue here, are appropriate for invoking the summary contempt power. Likewise, the United States Supreme Court, while recognizing that 'procedural regularity' has been a cornerstone in the development of our liberty, has condoned the use of summary contempt hearings in limited

situations. Harris, supra, 382 U.S. at 166-69, 86 S.Ct. at 355-57, 15 L.Ed.2d at 243-44; In re Oliver, 333 U.S. 257, 275, 68 S.Ct. 499, 508, 92 L.Ed.2d 682, 695 (1948). Thus, defendant's argument that the right of procedural due process as guaranteed by our state and federal constitutions precludes summarily trying an individual for contempt must be rejected.

B.

Defendant Was Not Denied Due Process Of
Law By Virtue Of The Alleged Procedural
Irregularities In The Hearing.

Defendant further argues that even if resort to summary proceedings was justified, certain errors committed by the trial court denied him procedural due process. Defendant alleges that the trial court found him in contempt before giving

him an opportunity to speak. Therefore, defendant continues, he was denied his right to be heard. Furthermore, defendant maintains that by imposing a prison sentence without allowing him to consult with an attorney, the trial court deprived him of his right to counsel. According to defendant, these purported errors resulted in a proceeding which was fundamentally unfair and thus require a reversal of his conviction for contempt.

Defendant attaches great significance to the fact that before he was given a chance to speak, the trial court twice stated that it "finds him in contempt" and also declared that the jury will be released. According to defendant, these comments indicate that the trial court had found him in contempt before he was able to address the issues of guilt and

punishment. Thus, defendant argues that his right of allocution was a "meaningless formalism" and he was, in essence, denied the opportunity to be heard.

In Vasky, supra, defendant was twice held in contempt for interrupting the proceedings. After admonishing defendant and having a lengthy confrontation with him, the trial court called a recess and, upon reconvening, stated:

Mr. Vasky, please stand. Mr. Vasky, I find that your action in refusing to obey the court's order [to be quiet] is in direct contempt in the face of the Court. I find you guilty of that contempt. Mr. Vasky, I'll hear you on the punishment for that contempt. [203 N.J.Super. at 95 (Emphasis supplied)].

Defendant used the opportunity to argue

that the trial court had violated his constitutional rights and that no sentence should be imposed because he had done nothing wrong. Nonetheless, the trial court assessed a \$250 fine for this conviction for contempt.

When defendant persisted in his obstreperous conduct, the trial court cleared the courtroom, again held defendant in contempt and allowed him to speak as to the sentence to be imposed. Defendant again protested that he had done nothing to warrant a finding of contempt. Thereafter, a sentence of 15 days in jail was imposed. The underlying matter for which defendant was standing trial proceeded to conclusion without further interruption.

In its de novo review of the contempt convictions, this court addressed

defendant's claim that he lacked the requisite mens rea to support a finding of criminal contempt. We thus noted:

While it is true that the trial judge did not specifically say that defendant had the opportunity to dispel the presence of criminal intent, it is evident that he was afforded that opportunity. The judge couched that opportunity in terms of inviting defendant to address himself to the sentence to be imposed. [Id. at 100].

This court adopted the trial court's findings of fact and affirmed both contempt convictions. In so holding, we explained "that the persistent refusal of defendant to accede to the directions of the trial judge constituted contempt in the face of the court and warranted his

conviction for contempt." Id. at 101.

[9] Vasky makes clear that a defendant is not denied his right to be heard merely because a trial court announces that it finds him in contempt before the defendant has had a chance to speak. The crucial consideration is whether a defendant is afforded an opportunity to address the court. Cf. United States v. Baldwin, 770 F.2d 1550, 1556 n.11 (11th Cir. 1985), cert. den. sub nom. Jackson v. United States, ___ U.S. ___, 106 S.Ct. 1636, 90 L.Ed.2d 182 (1986) (although defendant was summarily cited for contempt for being absent from court, the trial court would undoubtedly have modified its judgment had defendant's subsequent explanation brought to light facts not already known to the court). Here, defendant was in fact given that

opportunity. After reading the definition of contempt as set forth in Vasky, the trial court here told defendant:

Now I will accord you an opportunity to show that you did not possess at the time the requisite mens rea ...

* * * * *

You may be heard before I pass sentence.

Defendant gave a lengthy explanation for his conduct, after which the trial court inquired whether he wished to say anything further or call any witnesses. Although declining to offer additional evidence on his behalf, defendant enjoyed a full right of allocution. His assertion to the contrary is unfounded.

[10] Defendant also argues that the trial court's refusal to allow him to

consult with an attorney constituted a violation of his right of procedural due process and right to counsel as guaranteed by our federal and state constitutions. With respect to his federal constitutional rights, defendant relies principally upon Argersinger v. Hamlin, 407 U.S. 25, 36, 92 S.Ct. 2006, 2012, 32 L.Ed.2d 530, 538 (1972), in which the United States Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at trial." Regarding his rights under the New Jersey Constitution, defendant points to our Supreme Court's holding in Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971), that "no indigent defendant should be subjected to a

conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost."

On the basis of these and several other cases, defendant maintains that his constitutional rights were violated and, therefore, his conviction for contempt must be reversed.

The United States Supreme Court's holding in Argersinger was motivated by several key considerations. In explaining why the assistance of counsel is a requisite to a fair trial, the Supreme Court noted:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and

sometimes no skill in the science of law.... He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. [407 U.S. at 31, 92 S.Ct. at 2009, 32 L.Ed.2d at 535].

Additionally, the concern that all defendants, rich and poor alike, stand equal before the law was instrumental in the Supreme Court's decision. The Argersinger court further reasoned that the need for counsel is just as urgent in petty-offense prosecutions where the issues involved are often as complex as those in felony cases. Another factor underlying the Supreme Court's decision was that misdemeanants as well as felons

require guidance at the guilty plea stage to ensure that they understand the consequences of their pleas and that they are treated fairly by the prosecution. Also crucial to the Supreme Court's holding was the fact that the judicial system's preoccupation with the movement of cases frequently prejudices defendants charged with misdemeanors. The Supreme Court determined that the assistance of counsel was a necessary bulwark against this problem of assembly-line justice.

As Justice Powell pointed out in his concurrence in Argersinger, that case, like Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), embraced the larger concern of when the Due Process Clause requires that a defendant be represented by counsel. Argersinger, supra, 407 U.S. at 44-46, 92

S.Ct. at 2016-2017, 32 L.Ed.2d at 542-543 (Powell, J., concurring). The Supreme Court held that no person may be imprisoned for an offense unless he was represented by counsel at his trial, and, in reaching this conclusion, twice cited In re Oliver, supra. An examination of that decision provides guidance in the instant case.

In Oliver, petitioner was sentenced to 60 days imprisonment upon being convicted of contempt for allegedly testifying evasively before a one-man, judge-grand jury. While questioning petitioner in his capacity as a grand jury, the judge disbelieved petitioner's story, which conflicted with other testimony that had previously been given in a secret proceeding. The judge therefore charged petitioner with

contempt. The summary contempt hearing, like the grand jury investigation which precipitated it, was likely conducted in the judge's chambers and was closed to the public.

For several reasons, the United States Supreme Court concluded in Oliver that petitioner's conviction for contempt could not stand. One ground on which the conviction was overturned was that the contempt proceedings had been conducted in secret. The Court further held that the "failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law." 333 U.S. at 273, 68 S.Ct. at 507, 92 L.Ed. at 694. The Supreme Court explained:

Except for a narrowly limited

category of contempts, due process of law as explained in the Cooke Case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where

immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the Cooke Case, that the accused be accorded notice and a fair hearing as above set out. [Id. at 275, 68 S.Ct. at 508, 99 L.Ed.2d at 695 (Emphasis supplied)].

Because petitioner's contempt conviction was based, in part, upon testimony given in his absence, the Court concluded that that case did not fall within the narrow category of contempts which would allow abridging petitioner's due process rights.

Having cited to Oliver, the Argersinger court was undoubtedly aware of the implications of that decision--that an individual who commits contempt in the presence of the court can be tried instantly and sentenced to jail, even though he may not have been represented by counsel. Nonetheless, the Supreme Court did not overrule Oliver or modify that decision to comport with its holding in Argersinger. Thus, there is a compelling basis to conclude that the United States Supreme Court intended to keep intact the judicial power to punish summarily for contempts in facie curiae. Defendant's argument to the contrary must be rejected.

Moreover, even in the unlikely event that Argersinger should be read as limiting the use of the summary contempt power, the instant case is not one in

which any such limitation would apply. Defendant is not a layman who is innocent but too unskilled in the practice of law to establish that fact. He is an experienced trial attorney who obviously understood the charges brought against him and could have responded thereto. There was no danger that the complexity of the issues involved or the "assembly-line" nature of the hearing resulted in any prejudice that the presence of outside counsel would have averted. Likewise, defendant here was not indigent or unable to appreciate the consequences of a guilty plea. In short, none of the rationales underlying the holding in Argersinger are present here. Thus, Argersinger cannot and should not be interpreted as extending the right to counsel to defendant in this case.

Similarly, we are satisfied that, despite its holding in Rodriguez, supra, the New Jersey Supreme Court intended to preserve the court's summary contempt power. Nine years after deciding Rodriguez, our Supreme Court upheld the use of summary contempt proceedings in Yengo. There is no indication in Yengo that defendant had outside counsel when he was summarily tried before the trial court. However, his conviction was affirmed. The Court recognized that summary proceedings diminish one's due process rights, but, nevertheless, upheld the summary contempt power as a necessary incident to maintaining the dignity of the court. In light of the holding in Yengo, defendant's reliance upon Rodriguez is misplaced. The instant case involved contempt in the presence of the court,

and, therefore, due process did not mandate that defendant be represented by an attorney.

Consequently, as defendant's contumacious conduct occurred in the actual presence of the court and no evidence from other sources was necessary to adjudicate the contempt charge, the trial court properly invoked summary procedures. In addition, there were no procedural irregularities in the contempt proceedings to warrant overturning defendant's conviction.

II.

DEFENDANT'S CONDUCT CONSTITUTED CONTEMPT AS A MATTER OF LAW

Defendant argues that his gestures and physical reactions did not materially disrupt the proceedings, and, therefore, did not rise to the level of contempt.

Defendant characterizes his conduct as a "human reaction," an "involuntary reflex or release of tension," and an "isolated incident [which] ... took place outside the presence of the jury." Moreover, he asserts that his comments to the trial court were not the basis of his being held in contempt and, furthermore, were not disrespectful. According to defendant, "[t]he only disruption in the proceeding came as a result of the judge's own reaction to [defendant's] off-the-record conduct and his decision to enter the contempt citation." Similarly, defendant maintains that he was cited for contempt not because he obstructed justice, but because the trial court took umbrage at his conduct. Other considerations which defendant asserts militate against a finding that his conduct was contumacious

are an attorney's "duty to vigorously defend his client" and the "adversarial nature of the trial process." Lastly, defendant contends that he lacked the requisite mens rea to support his contempt conviction and also that the trial court improperly shifted to him the burden of proving that he lacked the necessary intent.

Although acknowledging the expansive definition of contempt employed by the courts of this State, defendant relies primarily upon federal cases in arguing that his conduct did not constitute contempt. Resort to federal case law is justified, in defendant's view, because the federal statute and rule are similar to those of New Jersey, because New Jersey courts have frequently looked to the larger body of federal law when addressing

issues of contempt and because the contempt power may implicate federal as well as state constitutional rights. To a certain extent, each of these observations is valid. However, they cannot obscure the overriding principle that, unless a provision of the United States Constitution is involved, federal precedent is in no way binding upon this tribunal. As the constitutional issues implicated in this appeal have already been addressed, this court may accord little significance to the federal cases cited by defendant. Reference to the law of other jurisdictions should be reserved for those issues not adequately covered by the abundance of New Jersey law dealing with contempt.

Citing myriad federal cases, defendant maintains that a finding of

contempt will not lie absent a "material disruption in or obstruction of a matter pending." Indeed, this is a correct statement of federal law. See In re McConnell, 370 U.S. 230 233, 82 S.Ct. 1288, 1290, 8 L.Ed.2d 434, 437 (1962); In re Michael, 326 U.S. 224, 226-229, 66 S.Ct. 78, 79-80, 90 L.Ed. 30, 32-33 (1945); Nye v. United States, 313 U.S. 33, 43-52, 61 S.Ct. 810, 813-17, 85 L.Ed. 1172, 1178-1182 (1941); United States v. Lowery, 733 F.2d 441, 445 (7th Cir.1984), cert. den. sub nom. Wolfson v. United States, 469 U.S. 932, 105 S.Ct. 1327, 71 L.Ed.2d 264 (1984); United States v. Thoreen, 653 F.2d 1332, 1340 (9th Cir.1981), cert. den. 455 U.S. 938, 102 S.Ct. 1428, 71 L.Ed.2d 648 (1982); In re Gustafson, 650 F.2d 1017, 1020 (9th Cir.1981); Gordon v. United States, 592

F.2d 1215, 1217 (1st Cir.1979, cert. den. 441 U.S. 912, 99 S.Ct. 2011, 60 L.Ed.2d 384 (1979); Com. of Pa. v. L.U. 542, Intern. U. of Op. Engrs., 552 F.2d 498, 509 (3d Cir.1977), cert. den. sub nom. Freedman v. Higginbotham, 434 U.S. 822, 98 S.Ct. 67, 54 L.Ed.2d 79 (1977); United States v. Seale, 461 F.2d 345, 369 (7th Cir.1972); In re Brown, 454 F.2d 999, 1003-1004 (D.C. Cir.1971). In contrast, we have been unable to find any reported New Jersey decision which holds that a material disruption is a sine qua non of a contempt conviction. Those cases which refer to the "obstruction of the administration of justice" explain that any conduct which has such a tendency may be punished as contemptuous. See, e.g., Sarner, supra, 28 N.J. at 524, Van Sweringen v. Van Sweringen, 22 N.J. 440,

445 (1956); Harbor Tank Storage Co., Inc.
v. De Angelis, 95 N.J.Super. 92, 99
(App.Div.1964), aff'd 45 N.J. 539 (1965);
State v. Jones, 105 N.J.Super. 493, 503
(Essex Co. 1969); In re Caruba, 139
N.J.Eq. 404, 411 (Ch. 1947), aff'd 140
N.J.Eq. 563 (E. & A. 1947), cert. den. 335
U.S. 846, 69 S.Ct. 69, 93 L.Ed. 396
(1948).

The reason for this difference
between federal and New Jersey case law is
apparent upon examining the respective
statutes defining contempt. 18 U.S.C. §
401 provides:

A court of the United States shall
have power to punish by fine or
imprisonment, at its discretion, such
contempt of its authority, and none
other, as--

(1) Misbehavior of any person in its

presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The New Jersey counterpart, N.J.S.A.

2A:10-1, reads:

The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:

a. Misbehavior of any person in the actual presence of the court;

b. Misbehavior of any officer of the court in his official transactions; and

c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person whatsoever to any lawful writ, process, judgment, order, or command of the court.

Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt.

Although the statutes are similar, it is clear that the New Jersey statute is more encompassing. Under N.J.S.A. 2A:10-1a, a court is empowered to sanction an individual for contempt for any misbehavior committed in its presence.

Under 18 U.S.C. § 401(1), a federal court can exercise its contempt power only if the misbehavior committed in the face of the court obstructs the administration of

justice.

[11] In light of this distinction, we reject defendant's argument, based upon federal case law, that his conduct did not cause a material disruption and therefore was not contemptuous. Simply put, the State need not prove that there was an obstruction of justice in order to sustain defendant's conviction. In this respect, Caruba, supra, is enlightening. There, defendant was held in contempt for committing perjury and, like defendant in the instant case, apparently argued that his conviction was improper behavior because his conduct did not obstruct justice. Dismissing this argument, the Caruba court explained:

The federal cases cited in support of the argument that where there is no obstruction of justice there is no

contempt are not controlling. They all arose out of contempt proceedings in inferior federal courts, the creatures of statute, having no common law jurisdiction in matters of contempt, and the decisions were controlled by statute. They need not be further considered here. None of the New Jersey cases cited is authority for the proposition advanced. They hold uniformly that any act or conduct which obstructs or tends to obstruct the course of justice constitutes a contempt of court. "The essence of contempt is that it obstructs or tends to obstruct the administration of justice." Fox, The History of Contempt of Court 216. And see Toledo Newspaper Co. v. United

States, 247 U.S. 402 [38 S.Ct. 560, 62 L.Ed. 1186 (1918)] [139 N.J.Eq. at 410-411 (Emphasis in the original)].

This reasoning applies with equal force to this case and warrants rejecting defendant's argument insofar as it is grounded in federal law.

Moreover, in Sax, supra, this court upheld a summary contempt conviction against a defendant who, after receiving a parking ticket, wrote a letter to a municipal court clerk containing obscenities and alleging "ugly" methods of collecting money. Similarly, this court held in State v. Gussman, 34 N.J.Super. 408 (App.Div.1955), that a traffic ticket recipient's letter to a judge claiming that he would not receive a fair trial justified summarily convicting him for

contempt. Clearly, there was no material disruption of the proceedings in either Sax or Gussman, but, nonetheless, this court opined that the convictions for contempt were warranted. Furthermore, both Sax and Gussman, were cited with approval by the New Jersey Supreme Court in Yengo. 84 N.J. at 123. As Justice Handler noted in his concurrence in Yengo:

A trial need not grind to a halt before obstreperous conduct can be regarded as a contemptuous affront to judicial authority. The combination of a purposeful attempt to interfere with the court and intentional acts which have the tendency to obstruct a court is sufficient. [84 N.J. at 136 (Handler, J., concurring)].

[12] New Jersey courts have determined that any act in opposition to

or which tends to lessen or bring into disrepute the court's authority or dignity is punishable as contempt. Vasky, supra, 203 N.J.Super. at 99; Gonzalez, supra, 134 N.J.Super. at 475. Under this standard, defendant's conduct was clearly contemptuous. During the first day of pretrial hearings, the trial court was indulgent of defendant's repeated challenges to its rulings on the polygraph issues. Defendant was afforded ample opportunity to contest each decision but his arguments were unavailing. Obviously disappointed, defendant flouted the court's authority by "shaking [his] head, smiling and being disrespectful" in response to the trial court's refusal to take judicial notice of certain polygraph articles. Upon being warned that further such antics would not be tolerated,

defendant again acted defiantly, daring the trial court to take whatever action it deemed necessary. Thereafter, defendant apologized for his behavior and explained that it was a human response. A repetition of these laughing, mocking gestures on the following day culminated in defendant's citation for contempt. This conduct smacked of disrespect and, as the trial court stated, "besmirch[ed] what [was] going on in th[e] court." Moreover, the record suggests that the manner in which defendant addressed the trial court when given an opportunity to be heard was likewise insolent. Thus, the trial court was warranted in holding defendant in contempt.

The conclusion that defendant's conduct constituted contempt is in no way vitiated by the fact that it occurred

while he was "vigorously defending" a client in a criminal matter. An attorney's actions which demean a trial court neither aid the search for truth nor conduce to the benefit of a defendant. Thus, eradicating this type of behavior through the contempt power will not threaten the "independence of the bar", "chill or effectively deny a defendant's right to counsel" or result in "an atmosphere of decorous understatement." As the United States Supreme Court commented in Sacher v. United States, 343 U.S. 1, 13, 72 S.Ct. 451, 457, 96 L.Ed. 717, 726 (1952), in response to similar arguments, a court should:

unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on

behalf of any person whatsoever. But it [should] not equate contempt with courage or insults with independence. It [should] also protect the processes of orderly trial, which is the supreme object of the lawyer's calling.

Moreover, measures which help insure that an attorney comports himself with proper etiquette in the courtroom are likely to better serve the interests of a criminal defendant. Despite defendant's responsibilities as a Public Defender, the contemptuous nature and recurrence of his conduct justified the trial court in summarily finding him in contempt.

[13] Defendant further argues that he lacked the necessary intent to support his conviction for contempt and also that the trial court erroneously shifted the burden

of proof regarding mens rea to him. It is well-settled that an essential element of the offense of contempt which must be proved beyond a reasonable doubt is willfulness or intentional conduct.

Carton, supra, 48 N.J. at 19; N.J. Dept. of Health v. Roselle, 34 N.J. 331, 337 (1961). Here, after citing defendant for contempt, the trial court remarked:

Now I will accord you an opportunity to show that you did not possess at the time the requisite mens rea ...

Although defendant's argument that the trial court improperly required him to prove a lack of intent has surface appeal, an examination of the relevant law and the facts of this case discloses the flaws in this argument.

In Vasky, supra, defendant, who was twice held in contempt for persistently

refusing to obey the directions of the trial court, likewise contended that his conduct was not willful or deliberate. As previously noted, the procedure followed in Vasky for each contempt citation was that the trial court found defendant in contempt and then told him that he could address the issue of punishment. Although the trial court made no mention of defendant's mens rea, we upheld both convictions. With respect to the element of intent, we explained:

While it is true that the trial judge did not specifically say that defendant had the opportunity to dispel the presence of criminal intent, it is evident that he was afforded that opportunity. The judge couched that opportunity in terms of inviting defendant to address himself

to the sentence to be imposed. ...
That defendant possessed the
requisite intent is clearly
demonstrated by the fact that he
composed himself and ceased his
interruptions of the court after the
jail sentence was imposed. [203
N.J.Super. at 100 (Emphasis
supplied)].

Because, in Vasky, the element of
willfulness was readily inferable from the
nature of defendant's conduct, we found
that defendant had the requisite mens rea
and, although given the opportunity to do
so, was unable to dispel its existence.
See Hinsinger, supra, 180 N.J.Super. at
497 ("[T]he contemnor must be accorded the
opportunity, as defendant was here, to
attempt to show that he did not possess
the requisite mens rea.").

[14] Vasky and Hinsinger make clear that, as with certain crimes, the very nature in which a contemptuous act is committed may support a finding that it was done with the requisite mens rea. Here, the trial court's finding that defendant acted willfully and deliberately is amply supported by the record. After the initial confrontation with the court on the first day of pretrial hearings, defendant was able to comport himself properly and, indeed, apologized to the trial court. Despite recognizing the impropriety of his conduct and showing that he could conduct himself in a manner befitting a court of law, defendant repeated his contumacious acts the following day. Moreover, in his brief, defendant attempts to defend his "expressions of disapproval" as a

"tactical weapon" designed to influence subsequent decisions by the trial court. In so describing his behavior, defendant concedes that his conduct was intentional, done for a specific purpose. Thus, defendant's contention that "[i]t is difficult to characterize [his] physical reaction as volitional; it is impossible to conclude beyond a reasonable doubt that it was intentionally wrongful" is unpersuasive. Both the nature of defendant's conduct and his own admission about its intended effect support the conclusion that defendant acted with the necessary mens rea. Since he did not offer an explanation to refute this finding, his conviction must stand.

Several other issues raised by defendant merit brief consideration. Defendant claims that the trial court's

willingness to reduce his sentence in exchange for an apology evidences that the trial court had become personally embroiled and also that defendant could not have materially disrupted the proceedings. Logically unsound, this argument is refuted by federal decisions which have recognized the reasonableness of commuting a sentence when a defendant has shown remorse. Baldwin, supra, 770 F.2d at 1556 n.11. See Groppit v. Leslie, 404 U.S. 496, 506 n.11, 92 S.Ct. 582, 588 n.11, 30 L.Ed.2d 632, 640 n.11 (1972).

[15] Defendant also suggests that the fact that his conduct occurred outside the presence of the jury weighs against concluding that it was contemptuous. In Gonzalez, defendant's acts of contempt were committed during sentencing and, thus, also occurred outside the jury's

presence. Addressing this factor, the Gonzalez court explained:

That is a distinction without a difference. All the conditions which justify summary convictions for contempt during a trial were present here. Defendant's contemptuous conduct occurred in open court and was directly witnessed by the judge. Immediate treatment was necessary to preserve order and a deliberate atmosphere in the courtroom. [134 N.J.Super. at 477].

This reasoning applies with equal force here.

[16] Lastly, defendant observes that holding that his conduct constituted contempt may have First Amendment implications. A similar argument was rejected by this court in Sax, supra,

where it was noted that contumacious speech is not protected since it does not excite "society's interest in truth and individual liberties." 139 N.J.Super. at 160 (quoting Gussman, supra, 34 N.J.Super. at 413). Thus, these considerations do not warrant altering our conclusion that defendant's conduct clearly falls within the definition under which courts of this State have punished such behavior as contemptuous. All elements of the offense, including defendant's mens rea, were established beyond a reasonable doubt.

III.

THE APPROPRIATENESS OF DEFENDANT'S PUNISHMENT

Finally, defendant contends that "the sentencing procedures used by the judge [were] so laden with error that the

sentence imposed by the trial court judge cannot stand." Specifically, defendant argues that the presumption against imprisonment was applicable to him and that, at the time of sentencing, the trial court failed to explain how that presumption was rebutted. Likewise, defendant maintains that the trial court considered neither the existence of any aggravating or mitigating factors nor whether his immediate incarceration would work an undue hardship on his family and/or clients. In defendant's view, the trial court's discussion of the aggravating and mitigating factors in the supplemental order was an "after-the-fact effort to cure the error" and cannot rectify the trial court's failure to consider certain crucial evidence before passing sentence. In conclusion,

defendant claims entitlement "to a hearing to determine the appropriate sentence under the principles set forth in State v. Vasky."

[17] While the trial court was required to consider the nature and circumstances of defendant's contempt, including aggravating or mitigating factors, it was not bound by the full gamut of sentencing provisions in our penal code. Although N.J.S.A. 2C:1-4 c provides that the Code's degree classification scheme applies to non-Code offenses, it is clear that the Legislature never intended the Code to apply a court's contempt power. Thus, N.J.S.A. 2C:1-5 c, which addresses the general applicability of the Code provisions, states that:

This section does not affect the power to punish for contempt, either

summarily or after indictment, or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.

As explained in the commentary to N.J.S.A. 2C:1-5 c in II Final Report of the New Jersey Criminal Law Revision Commission (Oct. 1971) at 12:

Paragraph c makes it clear that it is not a purpose of the Code to deal with the judicial power to punish for contempt or to use sanctions to enforce an order or a civil judgment or decree, even though imprisonment may be employed. Cf. In re Buehrer, supra.

The cases upon which defendant relies in arguing that the Code provisions apply in the instant case, State v. Sobel, 183 N.J.Super. 473 (App.Div.1982) and State v.

Dachielle, 195 N.J.Super. 40 (Law Div.1984), both involved offenses under Title 24, the Controlled Dangerous Substances Act. As there is direct statutory support for applying the Code provisions to Title 24 offenses, see N.J.S.A. 2C:43-1 b; N.J.S.A. 2C:1-5 b, these cases are distinguishable from the instant controversy. Thus, contrary to what defendant avers, neither the presumption against incarceration nor many of the other Code provisions apply in the instant case.

However, defendant is correct in before passing sentence. In Vasky, supra, we stressed the importance of the sentencing court's examining possible aggravating and mitigating factors, including whether or not an alleged contemnor has a prior criminal record or

history of contumacious conduct. Such an inquiry is especially important when there is uncertainty surrounding a defendant's past. In addition, we held that the trial court should have determined the financial impact that defendant's 15-day sentence would have upon defendant and his family. This consideration may have suggested that the sentence be served on weekends and nights. Because none of these essential findings had been made, we were unable to assess the propriety of the 15-day jail term and, therefore, remanded the matter to the trial court.

Here, the trial court stated in the March 24, 1986 supplemental order that "[t]he conduct of Mr. Daniels in this matter (as confirmed by his comments) and the need to deter him from similar future conduct was so significant that these two

aggravating factors qualitatively outweighed all mitigating factors." The trial court reached this decision even though it assumed that every mitigating factor was applicable to defendant. According to the trial court, a balancing of the aggravating and mitigating factors and the belief that defendant's conduct "created an open threat to the orderly procedure of the Court" warranted the imposition of a custodial sentence.

[18] Defendant's conduct occurred in a pretrial hearing outside the presence of the jury. Although this behavior was properly punishable as contempt, the circumstances suggest that the harm visited upon the judicial system was not too severe. Furthermore, being fined \$500 and rebuked in open court undoubtedly impressed upon defendant the seriousness

of his conduct and should deter him from similar acts in the future. Under the circumstances, we are satisfied that imprisonment was not an appropriate punishment for defendant's conduct.

Accordingly, we find defendant guilty beyond a reasonable doubt of the contempt charge and fine him \$500. We deem this punishment to be adequate and, thus, vacate the custodial portion of the sentence imposed by the trial court.

SKILLMAN, J.A.D., dissenting.

I agree for the reasons stated in the majority's comprehensive opinion that defendant's alleged contempt was in the presence of the court and thus was subject to summary adjudication by the trial judge pursuant to R. 1:10-1, that the power to proceed pursuant to R. 1:10-1 was not

lost by virtue of the delay in adjudicating the contempt, and that defendant was not entitled to counsel. However, I am unable to agree with the majority's conclusion that defendant's conduct constituted contempt as a matter of law. In my view, there is evidence in the existing record on which a finding of contempt could be sustained, but this evidence is subject to dispute in important respects. Since we are required to conduct a de novo review of the record on appeal from an adjudication of contempt and the existing record is inadequate to enable us to properly perform this responsibility, I would refer the matter to a trial court to conduct an evidentiary hearing and to submit to us recommending findings of fact and conclusions of law before we decide the

appeal.

The summary contempt power involves a delicate balance between conflicting imperatives of our judicial system. On the one hand, the power is indispensable to "protect the processes of orderly trial." Sacher v. United States, 343 U.S. 1, 14, 72 S.Ct. 451, 457, 96 L.Ed. 717 (1952). On the other hand, the power is capable of abuse for "... the court is at once the complainant, prosecutor, judge and executioner." In re Mattera, 34 N.J. 259, 272 (1961). Therefore, "[i]t is a power which can be justified by necessity alone." Ibid; see generally, Kuhns, "The Summary Contempt Power: A Critique and a New Perspective," 88 Yale L.J. 39 (1978).

A summary contempt proceeding against an attorney for conduct during trial raises especially difficult problems. See

Offut v. United States, 348 U.S. 11, 75
S.Ct. 11, 99 L.Ed. 11 (1954); Sacher v.
United States, supra; In re Carton, 48
N.J. 9 (1966). The Third Circuit Court of
Appeals has observed that:

A balance must be maintained,
however, between the necessity for
judicial power to curb obstruction of
justice in the courtroom and the need
for lawyers to present their clients'
cases fairly, fearlessly, and
strenuously. In preserving the
balance, a court must not exercise
its summary power of contempt to
stifle courageous and zealous
advocacy and thereby impair the
independence of the bar. On the
other hand, the dignity, the
independence, and the control of the
court must not be degraded by lawyers

who "equate contempt with courage....
[T]he processes of orderly trial,
which [are] the supreme object of the
lawyer's calling," must be protected.
Sacher v. United States, 343 U.S. 1,
14, 72 S.Ct. 451, 457, 96 L.Ed. 717
(1952). [Commonwealth of
Pennsylvania v. Local 542, supra, 552
F.2d 498, 503 (3rd Cir.1977), cert.
den. 434 U.S. 822, 98 S.Ct. 67, 54
L.Ed.2d 79 (1977).]

To preserve the authority of the
courts to conduct their proceedings in an
orderly manner and at the same time to
avoid abuses of the summary contempt
power, substantive and procedural
limitations have been imposed upon its
exercise. Substantively, to constitute
contempt an act "... must be accompanied
by a mens rea, a willfulness, an

indifference to the court's command." New Jersey Dept. of Health v. Roselle, 34 N.J. 331, 337 (1961); In re Mattera, supra, 34 N.J. at 273. Furthermore, the act must be more than a minor breach of proper courtroom decorum. See In re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962). Rather, because "[t]he sole credible basis for the summary contempt process is necessity, a need that the assigned role of the judiciary be not frustrated," In re Fair Lawn Education Ass'n, 63 N.J. 112, 114-15 (1973), cert. den., 414 U.S. 855, 94 S.Ct. 155, 38 L.Ed.2d 104 (1973), this power may be invoked only when the interference or threat of interference with the judicial process is imminent. Eaton v. City of Tulsa, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974).

The majority states that while the contempt power may be invoked in the federal courts only for an act which causes a "material disruption in or obstruction of a matter pending," the power may be invoked in the New Jersey courts for any conduct which "tends to obstruct the course of justice" (at 583-584; emphasis added). Although our courts have described the scope of the summary contempt power in more expansive terms than the federal courts, see, e.g., In re Caruba, 139 N.J.Eq. 404, 410-11 (Ch. 1947), aff'd 140 N.J.Eq. 563 (E. & A. 1947), cert. den. 335 U.S. 846, 69 S.Ct. 69, 93 L.Ed. 396 (1948), it is important not to overstate the magnitude of the difference between the federal and New Jersey standards for contempt. Our cases state as strongly as the federal cases

that the summary contempt power should be invoked only in circumstances where it is necessary. Compare Taylor v. Hayes, 418 U.S. 488, 496-500, 94 S.Ct. 2697, 2702-2704, 41 L.Ed.2d 897 (1974) and Harris v. United States, 382 U.S. 162, 167, 86 S.Ct. 352, 355, 15 L.Ed.2d 240 (1965) with In re Yengo, 84 N.J. 111, 122 (1980), cert. den., 449 U.S. 1124, 101 S.Ct. 941, 67 L.Ed.2d 110 (1981); and In re Mattera, supra, 34 N.J. at 272. Furthermore, there are federal constitutional limitations upon a state court's exercise the summary contempt power. See, e.g., Eaton v. Tulsa, supra; Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); Holt v. Virginia, 381 U.S. 131, 85 S.Ct. 1375, 14 L.Ed.2d 290 (1965); In re Little, 404 U.S. 553, 92 S.Ct. 659, 30 L.Ed.2d 708 (1972). For a party's conduct

to be punishable as contempt, it "... must constitute an imminent, not merely a likely, threat to the administration of justice." Eaton v. Tulsa, supra, 415 U.S. at 698, 94 S.Ct. 1229, quoting Craig v. Harney, 331 U.S. 367, 376, -67 S.Ct. 1249, 1255, 91 L.Ed.2d 1546 (1947). Thus, the Court has held that due process was denied by state courts summarily adjudicating contempts on the basis in Eaton v. Tulsa of a party referring to another party in open court as "chicken shit" and in In re Little a pro se defendant asserting in his summation that the trial judge "was biased and had prejudged the case and that [defendant] was a political prisoner." Therefore, while I agree with the majority's conclusion that conduct in our courts which has a "tendency to" obstruct the administration of justice may be

contempt, I would conclude that the tendency must be immediate and direct before the "necessity" for invocation of the contempt power can arise.

The procedural safeguards imposed upon the exercise of the contempt power include the presumption of innocence, the privilege against self-incrimination, the right of cross-examination, the admissibility of evidence in accordance with the rules of evidence and the requirement of proof beyond a reasonable doubt. In re Yengo, supra, 84 N.J. at 120. Furthermore, except when a contempt occurs in the actual presence of the judge, it must be heard by a judge other than the one allegedly offended. R. 1:190-1, 1:10-2 and 1:10-4, See In re Yengo, supra, 84 N.J. at 121.

The procedural safeguard most

significant to this appeal is that an appellate court is required to make an independent de novo review of a finding of contempt "on the law and on the facts." R. 2:10-4; see In re Yengo, supra, at 127; In re Hinsinger, 180 N.J.Super. 491, 498 (App.Div.1981). We have observed that "[t]his extraordinary review is given doubtless because in the court of first instance the same judicial officer directs the contempt proceeding to be initiated, appoints the prosecutor, tries the facts, imposes the penalty and may also be unconsciously influenced by the circumstance that he presides over the court against which the alleged contempt was aimed." Zimmerman v. Zimmerman, 12 N.J.Super. 61, 69 (App.Div.1950). On another occasion, we observed that "[t]he nature of our review stands 'as a bulwark

against an attenuation of the rights of an accused.'" State v. Vasky, 203 N.J.Super. 91, 100 (App.Div.1985), quoting In re Education Assoc. of Passaic, Inc., 117 N.J.Super. 255, 259 (App.Div.1971), certif. den. 60 N.J. 198 (1972). The unrestrained exercise of this power of de novo review is especially important with respect to a contempt in the presence of the court which has been summarily adjudicated by the offended judge. See In re Yengo, supra, 84 N.J. at 127; see also In re Contempt of Ungar, 160 N.J.Super. 322 (App.Div.1978).

Under the statute which governed appeals of contempts from 1884 to 1948, the trial de novo on appeal would be based upon evidence presented in the appellate court. See Attorney General v. Verdon, 90 N.J.L. 494 (E. & A. 1917); Zimmerman v.

Zimmerman, supra, 12 N.J.Super. 68-69.

Such evidence would be obtained "by depositions or in such other way or manner as the court above shall direct." L.

1884, c. 147, § 2. However, this provision was deleted in 1948. L. 1948, c. 333, § 1 and 2. Consequently, the de novo review on an appeal from an adjudication of contempt is now ordinarily based entirely on the trial record. See In re Yengo, supra; Zimmerman v.

Zimmerman, supra, 12 N.J.Super. at 69.

However, this court's authority to order supplementation of the trial record is implicit in the broad responsibility conferred upon us by R. 2:10-4 to conduct a de novo review of the facts underlying a contempt. As we stated in State v.

Zarafu, 35 N.J.Super. 177, 184

(App.Div.1955), involving contempt in the

presence of a municipal court, "it would be improper to proceed to a disposition of the matter on the merits where the accused did not have a full opportunity to present his side of the case at the original proceeding." See also Zimmerman v. Zimmerman, supra, 12 N.J.Super. at 69.

Although this court has the authority to order supplementation of the record on appeal from an adjudication of contempt, it should be emphasized that the trial record is ordinarily sufficient for a de novo review of the facts. In record to contempts outside the presence of the court, R. 1:10-2 and 1:10-4 contemplate proceedings in which most of the procedural formalities of a conventional trial are followed, including notice to the accused, the right to counsel the right to confrontation and the right to

summon witnesses. See In re Carton, supra, 48 N.J. at 21-22; see also In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed.2d 682 (1948). Hence, it is highly unlikely that such a proceeding would produce a record which would be inadequate for de novo review on appeal. In regard to contempts within the presence of the court, R. 1:10-1 authorizes summary proceedings which lack the normal procedural safeguards of a criminal trial. There is no advance notice of the initiation of the proceedings, no right to counsel and often significant limitations on the opportunity to present a defense. See In re Yengo, supra, 84 N.J. at 121; In re Lependorf, 212 N.J.Super. 284, 292-93 (App.Div.1986). Nevertheless, experience shows that the trial record is ordinarily adequate for de novo review of contempts

in the presence of the court, because the alleged contemptuous conduct, as well as any defense to the charge, is usually clear from the trial record. Thus, where an attorney is late arriving in court, See In re Dias, 76 N.J.Super. 337, 340 (App.Div.1962), or fails to appear at all, see In re Yengo, supra, the failure, as well as any excuse offered by the accused, are generally clear from the trial record. Similarly, where a contempt consists of derogatory or insulting language used in open court, this language will appear in the stenographic record. See State v. Gonzalez, 134 N.J.Super. 472 (App.Div.1975), aff'd in part and rev'd in part, 69 N.J. 397 (1975).

The contempt involved in this appeal is unusual in that it does not consist of conduct or language which is unambiguously

set forth on the trial record. Rather, it consists of facial expressions and gestures. I have no doubt that such conduct can be as contemptuous as the spoken word, and that it would be subject to summary adjudication as a contempt in the presence of the court. However, this form of contempt presents some unique problems. First of all, a court must be cognizant of the fact that persons may make facial grimaces and other gestures unwittingly, especially when they are under emotional stress. Therefore, it may be more difficult than in a case involving another form of contempt for a court to determine whether a facial expression or gesture is made willfully with an intention to disrupt or to cause disrespect for the court. Secondly, while language in the courtroom which has been

found contemptuous may be directly reviewed from the stenographic record, an appellate court must rely upon descriptions by observers to determine whether facial expressions and gestures were contemptuous. And since observers may describe an accused's courtroom demeanor differently, an evidentiary hearing may be required to resolve those differences.

I am convinced that the record in this case contains conflicts and ambiguities concerning defendant's conduct and intentions which require supplementation of the record to enable us to discharge our responsibilities of de novo review. I have no doubt that the facts set forth in the trial judge's supplemental order of March 24, 1986 and summarized in the majority's opinion (at

562-564) would constitute contempt. However, the certification of facts contained in the trial judge's supplemental order is disputed in a number of material respects. Thus, the trial judge's certification recites that

... on March 19, 1986, Mr. Daniels reacted with expressions exhibiting disrespect, disdain and scorn similar to but more egregious than his conduct of the prior day. While I was placing on the record my findings and holding, Mr. Daniels again laughed, threw himself back into his chair, shook his head and covered his eyes.

This certification also recites that a number of defendant's statements were made "in a disrespectful manner," "with a contemptuous voice" and "sarcastically."

On the other hand, the clerk of the trial court has submitted an affidavit, which has been made part of the appellate record,¹

1 We granted defendant's motion to supplement the record with his affidavit and that of the clerk. We also granted a motion by the State to supplement the record with an affidavit of the assistant prosecutor who handled the underlying criminal case in which the alleged contempt occurred. The better practice would have been for these affidavits to have been presented to the trial court in connection with a motion to reconsider the order of contempt. However, the summary nature of the proceedings under R. 1:10-1 requires that a liberal approach be taken to any motion to supplement the record on appeal.

which states in pertinent part:

4. After hearing argument from both counsel, the Court began to render its decision. At that time, I was not looking at Mr. Daniels and therefore did not see Mr. Daniels make any gestures. I was, however, seated only a few feet from Mr.

Daniels. Prior to being held in contempt, I did not hear Mr. Daniels say a word or utter any sound.

5. After being held in contempt, the Court gave Mr. Daniels an opportunity to be heard. When Mr. Daniels addressed the Court, he vigorously defended his position.

Mr. Daniels aggressively stated his

opinion. He was not sarcastic or disrespectful in his manner or tone of voice.

In addition, defendant expressly denied on the record that he had made any disrespectful gestures.

Several of defendant's statements quoted by the majority unquestionably exhibit a confrontational approach towards the trial judge. However, apart from the disputed facial expressions and gestures, these statements would not constitute "an imminent ... threat to the administration of justice." Eaton v. Tulsa, supra, 415 U.S. at 698, 94 S.Ct. at 1229. Nor could it be concluded that these statements were made willfully with "... an indifference to the court's command.." New Jersey

Dept. of Health v. Roselle, 34 N.J. 337.

Therefore, the undisputed parts of the trial record do not establish that defendant committed a contempt of court. See In re Little, supra; State v. Jones, 105 N.J.Super. 493 (Law Div.1969).

There is an understandable reluctance to order an evidentiary hearing in which the trial judge may need to be called as a witness. However, where a trial judge's certification of facts differs in material respects from other evidence in the record, such a hearing is mandated. See State v. Jones, supra. Our responsibility to conduct a de novo review of the facts on an appeal from an adjudication of contempt precludes us from simply accepting a trial judge's certification

and rejecting conflicting evidence without a hearing.

Where a trial record is not adequate for a complete and fair review of an adjudication of contempt, it is appropriate under some circumstances to remand the matter to the trial judge.

See, e.g., State v. Zoppi, 72 N.J. Super. 432, 437 (App.Div. 1962); State v. Zarafu, supra. However, this would not be an appropriate disposition under the circumstances of the present case because the trial judge may need to be called as a witness at the hearing.² Furthermore, as I view this case, what is now required is

2 A remand to the trial judge would not be possible in any event because he is no longer on the state bench.

not a rehearing of the contempt at the trial level pursuant to R. 1:10-2 and 1:10-4, but rather a hearing to develop a complete record for de novo appellate review of a contempt properly adjudicated pursuant to R. 1:10-1. In this procedural posture, the most appropriate disposition is to retain jurisdiction and to refer the matter to an appropriate trial court to hear the evidence and to submit to us recommended findings of fact and conclusions of law.

Accordingly, I dissent from the judgment adjudicating defendant guilty of contempt based on the existing record.

S. DAVID LEVY
Deputy Public Defender
Office of the Public Defender
Union Region
125 Broad Street
Elizabeth, New Jersey 07201
(201) 820-3070

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-UNION COUNTY
CRIMINAL
Dated Mar. 19, 1986

THE MATTER OF :
:
ORDER
JAMES B. DANIELS, ESQ. :

This matter having been opened to the Court by James B. Kervick, Assistant Deputy Public Defender, in the presence of _____, Assistant Prosecutor, and the Court having considered the papers and having heard the arguments of counsel:

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It is on this 19th day of March, 1986, ORDERED that James B. Daniels, Assistant Deputy Public Defender, be sentenced for contempt of court, pursuant to R. 1:10-1 to a period of two days in the Union County Jail and \$500.00 fine.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., J.S.C.

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ORDER ON
MOTIONS/PETITIONS
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
MOTION NO.
BEFORE PART D
BEFORE JUDGES MICHELS
GAULKIN
DEIGHAN

Date Mar 19 1986

FILED WITH THE COURT

IN THE MATTER OF
JAMES B. DANIELS, ESQ.

s/ Herman D. Michels
HERMAN D. MICHELS, P.J.A.D.
MOVING PAPERS FILED MARCH 19, 1986
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT MARCH 19, 1986
DATE ARGUED
DATE DECIDED MARCH 19, 1986
ORDER

THIS MATTER HAVING BEEN DULY
PRESENTED TO THE COURT, IT IS

HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/XXXXXXXXX			
FOR TEMPORARY			
EMERGENT RELIEF	X		X

SUPPLEMENTAL:

The Order of the Law Division sentencing defendant James B. Daniels, Assistant Deputy Public Defender, for contempt of court to two days in the Union County Jail and fining him \$500, dated March 19, 1986, is stayed pending appeal. Defendant James B. Daniels, Esq., shall be released on his own recognizance.

The court on its own motion hereby accelerates the appeal and directs that the Clerk of the Appellate Division to prepare an accelerated briefing schedule and set the matter down for argument or submission as soon as practicable.

FOR THE COURT:

s/ Herman D. Michels
HERMAN D. MICHELS,
P.J.A.D.

WITNESS, THE HONORABLE HERMAN D. MICHELS, PRESIDING JUDGE OF PART D, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 19TH DAY OF MARCH, 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE
DIVISION

PREPARED BY THE COURT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-323-85T5

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - UNION COUNTY
Dated March 24, 1986

Contempt

IN THE MATTER OF :
JAMES B. DANIELS, ESQ. :

ORDER OF CONTEMPT

This matter having occurred in open Court in the presence of James B. Daniels, Assistant Deputy Public Defender and in the presence of Thomas Simon, Assistant Prosecutor, and for good cause shown:

It is on this 24th day of March, 1986

ORDERED that James B. Daniels, Assistant Deputy Public Defender, be sentenced for Contempt of Court for a period of two days to the Union County

Jail and a fine of \$500.00.

On March 19, 1986 the Office of the Public Defender presented an order for signature, attached as Exhibit A, and requested it be signed to permit the filing of an immediate appeal with the Appellate Division. Douglas T. Kabak, an attorney with the Office of the Public Defender, who presented the form of order for signature, was informed that the order should contain information as required pursuant to Rule 1:10-1. Since neither secretarial assistance was available nor was there time to supplement the order, the order was signed, as then presented, to permit the immediate appeal.

This order is entered in compliance with Rule 1:10-1 and is meant to supplement the Order signed on March 19, 1986.

The facts upon which this contempt in the presence of the Court has been adjudicated are as follows:

1. Hearings were held on March 18, 1986 in the matter entitled State v. McMahon, Indictment No.: 1502-11-85. During these hearings on March 18, 1986, which were outside the presence of a jury, James B. Daniels was cautioned that his conduct was offensive (See excerpts of proceedings page 2 line 14-22.) and disruptive to the orderly proceedings of the Court.

2. The conduct of Mr. Daniels on March 18, 1986 consisted of various expressions of disrespect during the rendering of an opinion, including shaking his head, laughing, and rolling his eyes and head to express his disapproval and scorn. (page 2 line 14--16). Mr. Daniels

was explicitly warned not to repeat the conduct (page 2 line 18--24).

3. Mr. Daniels was warned in detail that should he repeat his conduct he would be found in contempt of court and placed in the County Jail. He was warned this was not a possibility but a certain reaction to a repeat of his conduct. (page 2 line 18--22).

4. Mr. Daniels was asked on March 18, 1986 as to whether he understood the warning. He sarcastically responded that "[y]ou [the court] could not be clearer." (page 3 line 1--3).

5. On March 18, 1986, before he was warned and a description of his conduct was placed on the record, Mr. Daniels was apprised of my concern for his actions and was informed that "appropriate actions" would be taken in a response to a repeat

of his conduct. (page 2 line 8--10). In response to this, Mr. Daniels stated "[y]our Honor, go right ahead, take whatever appropriate actions your Honor deems necessary." (page 2 line 11-13). This was a statement which by its terms, inflection of voice and sarcastic manner of delivery verbally confirmed the disrespect of Mr. Daniels evidenced just a few moments earlier.

6. Although it would have been justified, no reaction was made to the dare of Mr. Daniels to take whatever appropriate actions I deemed were necessary. In fact, an effort was made to defuse the situation.

7. Following a recess to handle another matter, Mr. Daniels recognized the seriousness of his conduct and apologized for his conduct. (page 3 line 11--15). I

then indicated that we should "put it behind us and forget about it." (page 3 line 16--17).

8. On March 19, 1986 following the completion of selection of the jury but prior to swearing the jury and outside the presence of the jury, Mr. Daniels made a motion pursuant to State v. Gilmore, 199 N.J. Super. 389 (App. Div. 1985), (petition for certification filed.)

9. After hearing arguments of counsel, it was pointed out there are four criteria that would have to be met by the defense attorney, the first being that a timely motion be made. I acknowledged the motion was made before the swearing of the jury, as required, but nevertheless questioned the timeliness of the motion. Before this comment could be explained and before the balance of the findings and

opinion could be stated, Mr. Daniels again reacted with seriously offensive and contemptuous conduct.

10. At this time on March 19, 1986, Mr. Daniels reacted with expressions exhibiting disrespect, disdain and scorn similar to but more egregious than his conduct on the prior day. While I was placing on the record my findings and holding, Mr. Daniels again laughed, threw himself back into his chair, shook his head and covered his eyes. (page 4 line 17--19).

11. Mr. Daniels was cited for contempt of court (page 4 line 23). Although I used the term "find" on several occasions (page 4 line 23, page 6 line 2, page 6 line 4, 5 and 15), the use of this term on the first two occasions (page 4 line 23, page 6 line 2) was in effect a

notification or charge of contempt of court. Mr. Daniels was not held in contempt of court until after he was given an opportunity to be heard with regard to his mens rea and sentencing. (page 4 line 24; page 5 line 20--23; page 6 line 3).

12. Mr. Daniels interrupted my comments and denied on the record that he did any of the things described in paragraph 10. He then stated "[a]nd I'm tired of this kind of stuff." (page 4 line 22). This comment by Mr. Daniels was made in a disrespectful voice.

13. At this time, Mr. Daniels was asked as to whether he wished to respond (page 4 line 24). It was indicated that Mr. Daniels would be afforded "an opportunity to show [he] did not possess at the time the requisite mens rea but this will be done at the summary hearing

immediately." (page 5 line 20--23).

14. I also noted Mr. Daniels had been previously warned about his conduct in court. (page 5 line 24--page 6 line 2). As I mentioned this, Mr. Daniels again began to laugh and demonstrate his disrespect; this was noted on the record. (page 6 line 4).

15. Thereafter Mr. Daniels entered into what can only be described as a tirade (page 6 line 5--page 8 line 17). At a point during his comments, it was necessary to direct him to lower his voice which he acknowledged and for which he apologized. (page 7 line 16--18). However, in the next breath, Mr. Daniels stated "I'm trying to show the most respect that I can for this court." (page 7 line 18--19) (emphasis as stated). This comment, by the inflection of his voice,

was made in a disrespectful manner. It was calculated to be offensive and was offensive.

16. During the comments by Mr. Daniels, he accused the Court of being "a second prosecutor." (page 6 line 10--13). Again, this was done with a contemptuous voice.

17. Mr. Daniels sought to explain his conduct by indiating that he was "human." (page 6 line 6--7, line 23). Although Mr. Daniels was afforded an opportunity to demonstrate he did not have the requisite mens rea, his explanations were unavailing. In point of fact, he admitted doing what he previously denied happened. (page 6 line 23 to page 7 line 1).

18. Mr. Daniels stated "I think that if we put anybody in this courtroom right

now [on the stand] that they would testify that I did nothing that was disrespectful to the Court." (page 7 line 2--4).

19. After Mr. Daniels completed his comments, he was asked whether he wished to say anything further. He was also asked whether he wished to call any witnesses. Mr. Daniels' answers to both questions were negative (page 8 line 15--page 9 line 13). No one in the courtroom could support the contentions made by Mr. Daniels; this was obvious when he declined the opportunity to call witnesses.

20. The conduct of Mr. Daniels was willful, deliberate and disruptive to the proceedings of the Court and committed in my presence.

21. I find that Mr. Daniels willfully disregarded the warning and direction of this court and was willfully

contemptuous. This is especially so in light of his comment on March 18, 1986, as set forth in paragraphs 4 and 5.

Moreover, even after citing him for contempt and demonstrating on the record on March 19, 1986 that his conduct was contemptuous, and before giving him the opportunity to be heard with regard to sentencing or demonstration that he did not possess the mens rea, I found that he was continuing to laugh and demonstrate disrespect and disdain. (page 6 line 4). In addition, his comments addressed to the court on March 19, 1986 were calculated to and had the effect of lessening the dignity of the court. This was made plain when Mr. Daniels sarcastically stated "I am trying to show the most respect I can for this Court." (page 7 line 18--19) (emphasis as stated).

22. Because of the conduct demonstrated by and comments by Mr. Daniels on March 19, 1986, as aforesaid, and especially in light of the warning given and his conduct on March 18, 1986, I found this conduct (as confirmed by his comments) created an open threat to the orderly procedure of the Court. Such conduct required that it be instantly suppressed and punished. Imposition of a custodial sentence was required.

23. Although at the time of sentencing of Mr. Daniels for this contempt of court it was not stated on the record, I found that the aggravating factors outweighed the mitigating factors (N.J.S.A. 2C:44-1). The conduct of Mr. Daniels in this matter (as confirmed by his comments) and the need to deter him from similar future conduct was so

significant that these two aggravating factors qualitatively outweighed all mitigating factors. Although Mr. Daniels did not address his comments to sentencing, I assumed he had no prior record and further assumed that the other mitigating factors would be applicable to him. Nevertheless, it was a balancing of the quality of factors which required the imposition of incarceration.

24. Shortly after the completion of the proceedings as described above, a representative of the Office of the Public Defender came to see me in chambers on behalf of Mr. Daniels. He asked as to whether I would be willing to vacate the sentence of two days in the County Jail if Mr. Daniels apologized. I responded and stated I would in fact vacate the imposition of the jail sentence and, even

though not asked to do so, I would also reduce the fine, if Mr. Daniels apologized. The representative indicated he was glad to know that and stated he would immediately speak with Mr. Daniels. A short time later, I received a telephone call from this person and was informed Mr. Daniels was not interested in apologizing. About forty-five minutes later a second representative of the Office of the Public Defender came to see me. The same conversation was repeated with the same result--Mr. Daniels was not interested in apologizing.

25. This will certify I saw and heard the conduct constituting the contempt referred to herein and as cited to the transcript of proceedings attached as Exhibit B and incorporated herein by reference.

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s/ Hon. Alfred J. Lechner, Jr.
HON. ALFRED J. LECHNER, JR.

A-3243-85T5

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
MOTION NO. M-3458-85
BEFORE PART E
JUDGE BILDER

Dated May 8, 1986

IN THE MATTER OF
JAMES B. DANIELS, ESQUIRE.

MOVING PAPERS FILED APRIL 16, 1986
ANSWERING PAPERS FILED APRIL 24, 1986
DATE SUBMITTED TO COURT MAY 5, 1986
DATE ARGUED
DATE DECIDED MAY 8, 1986

ORDER

THIS MATTER HAVING BEEN DULY
PRESENTED TO THE COURT, IT IS

HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/XXXXXXXXX			
FOR LEAVE TO			
APPEAL AS AMICUS			
CURIAE AND TO	X	X	X
PARTICIPATE IN			
ORAL ARGUMENT			

SUPPLEMENTAL:

LEAVE TO FILE A BRIEF IS GRANTED.

LEAVE TO PARTICIPATE IN ORAL ARGUMENT IS DENIED.

THE BRIEF SHALL BE LIMITED TO THE ISSUE SET FORTH IN THE AFFIDAVIT -- THE CHILLING EFFECT THAT MISUSE AND/OR PRECIPITOUS USE OF THE SUMMARY CONTEMPT POWER CAN HAVE ON ATTORNEY'S VIGOROUS REPRESENTATION OF HIS OR HER CLIENT.

FOR THE COURT:

s/ Lawrence Bilder
LAWRENCE BILDER, P.J.A.D.

WITNESS, THE HONORABLE LAWRENCE BILDER, XXXXXXXXXX JUDGE OF PART E, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 8TH DAY OF MAY 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
Dated May 2, 1986

NOTICE OF MOTION

IN THE MATTER OF :
JAMES B. DANIELS, ESQ. :

TO: Richard W. Berg, D.A.G.
Office of the Attorney General
Hughes Justice Complex
Trenton, New Jersey 08625

PLEASE TAKE NOTICE that appellant James Daniels, by his attorneys, hereby moves before the Superior Court of New Jersey, Appellate Division for an order pursuant to R. 2:5-5 to supplement the record in this matter.

Appellant will rely upon the brief and appendix submitted herewith in support of this motion.

Alfred A. Slocum
Public Advocate
Dept. of the Public Advocate
Richard J. Hughes Justice
Complex
CN 850

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Trenton, New Jersey 08625
(609) 292-1889
Attorneys for Appellant

By: s/ Louis S. Raveson
Louis S. Raveson
Assistant Commissioner

Dated: May 2, 1986

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ORDER ON
MOTIONS/PETITIONS

A-3243-85T5
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3243-85T5
MOTION NO. M-3728-85(s)
BEFORE PART E
JUDGE BILDER

Dated June 2, 1986

IN THE MATTER OF JAMES B. DANIELS, ESQUIRE

MOVING PAPERS FILED	May 2, 1986
ANSWERING PAPERS FILED	May 14,
1986	
DATE SUBMITTED TO COURT	May 19,
1986	
DATE ARGUED	
DATE DECIDED	June 2,
1986	

SUPPLEMENTAL ORDER

THIS MATTER HAVING BEEN DULY
PRESENTED TO THE COURT, IT IS

HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
MOTION/XXXXXXXXXX			
TO SUPPLEMENT	X		X
THE RECORD			

SUPPLEMENTAL:

In clarification of my earlier order, leave is granted to supplement the record with affidavits but insofar as the motion seeks a remand for the taking of testimony, the motion is denied.

FOR THE COURT:

s/ Lawrence Bilder
LAWRENCE BILDER, J.A.D.

WITNESS, THE HONORABLE LAWRENCE
BILDER, XXXXXXXXXX JUDGE OF PART E,
SUPERIOR COURT OF NEW JERSEY, APPELLATE
DIVISION, THIS 2ND DAY OF JUNE 1986.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

S. DAVID LEVY
Deputy Public Defender
Office of the Public Defender
Union Region
125 Broad Street
Elizabeth, New Jersey 07201
(201) 820-3070

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-UNION COUNTY

DOCKET NO. A-3423-85-T5

Dated April 29, 1989

IN THE MATTER OF :
 :
JAMES B. DANIELS, ESQ. :

A F F I D A V I T

STATE OF NEW JERSEY:
 : SS.
COUNTY OF UNION :

I, JAMES B. DANIELS, of full age,
having been duly sworn upon my oath
according to law, depose and say:

1. I am an Assistant Deputy Public

Defender employed by the Union County Trial Region of the Office of the Public Defender.

2. On March 19, 1986, in the course of selecting a jury in State v. McMahan, Indictment No. 1502-11-85, the Honorable Alfred J. Lechner, Jr. held me in contempt of court for visibly displaying my displeasure with the Court's ruling on my motion for a mistrial made pursuant to State v. Gilmore, 199 N.J. Super. 385 (App. Div. 1985).

3. At the time of this incident Assistant Prosecutor Thomas P. Simon represented the State and Ms. Judy Kollarik was the official court reporter assigned to Judge Lechner's court. Both Mr. Simon and Ms. Kollarik were present in court during the contempt proceedings.

4. Subsequent to the above incident

I spoke with both Assistant Prosecutor Simon and Ms. Kollarik.

5. Assistant Prosecutor Simon stated that during the course of the court rendering its decision on my Gilmore application he looked up at the bench and observed Judge Lechner glaring in my direction. As he turned to look at me, he observed me sitting back in my chair, shaking my head disapprovingly with a smile or grin on my face. Mr. Simon further stated that prior to being held in contempt he did not hear me say a word or utter a sound. When given an opportunity to address the court, Mr. Simon stated that I vigorously defended my position as he had heard many attorneys argue and defend their respective positions in the past.

6. Ms. Kollarik, in discussing this

incident with me, stated the following:
As the Court began to rule against me on the Gilmore application, she, too, observed me lean back in my chair, put my hand to my forehead and shake my head in disagreement with the Court. At that time I was grinning or smiling. Although seated only a few feet from me, she did not hear me say a word or make a sound. Moreover, she stated that had I said anything, made any sound or laughed audibly in the courtroom, those remarks would have been recorded and incorporated into the transcript she prepared for this appeal.

7. The above facts are true to the best of my knowledge.

s/ James B. Daniels
JAMES B. DANIELS, ESQ.

- 235a -

Sworn and subscribed to before
me this 1st day of May, 1986.

s/ Frank R. Krack
ATTORNEY-AT-LAW, STATE OF NEW JERSEY

S. DAVID LEVY
Deputy Public Defender
Office of the Public Defender
Union Region
125 Broad Street
Elizabeth, New Jersey 07201
(201) 820-3070

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-UNION COUNTY
CRIMINAL

DOCKET NO. A-3423-85-T5

Dated April 29, 1986

IN THE MATTER OF :
:
JAMES L. DANIELS :

A F F I D A V I T

STATE OF NEW JERSEY:
: SS.
COUNTY OF UNION :

I, James Tighe, of full age, being
duly sworn upon my oath, depose and say:

1. I am a Court Clerk employed by
Union County. On Wednesday, March 18,
1986, I was assigned to the courtroom of

the Honorable Alfred J. Lechner, Jr.

2. On March 18, 1986 the matter of State v. Michael McMahan, Indictment No. 1502-11-85 was being tried. Assistant Prosecutor Thomas P. Simon represented the State. Assistant Deputy Public Defender James B. Daniels represented the defendant.

3. After handling some pretrial matters, jury selection began the morning of March 18, 1986 and continued after the luncheon recess. After both the prosecutor and defense counsel stated that the jury was satisfactory, the Court excused the jury and sent them into the jury room. At that time, Mr. Daniels moved for a mistrial arguing that the State had improperly excused all black women from the jury.

4. After hearing arguments from both

counsel, the Court began to render its decision. At that time, I was not looking at Mr. Daniels and therefore did not see Mr. Daniels make any gestures. I was, however, seated only a few feet from Mr. Daniels. Prior to being held in contempt, I did not hear Mr. Daniels say a word or utter any sound.

5. After being held in contempt, the Court gave Mr. Daniels an opportunity to be heard. When Mr. Daniels addressed the Court, he vigorously defended his position.

Mr. Daniels aggressively stated his opinion. He was not sarcastic or disrespectful in his manner or tone of voice.

6. The above is true to the best of my knowledge.

s/ James Tighe
JAMES TIGHE

Sworn and subscribed to before
me this 29th day of April, 1986.

s/ James B. Daniels
ATTORNEY-AT-LAW, STATE OF NEW JERSEY

SUPREME COURT OF THE UNITED STATES

No. A-804

James B. Daniels,

Petitioner

v.

Superior Court of New Jersey, Appellate
Division

O R D E R

UPON CONSIDERATION of the application
of counsel for the petitioner,

IT IS ORDERED that the time for
filing a petition for a writ of certiorari
in the above-entitled case, be and the
same is hereby, extended to and including
6/18/90, 1990.

s/ Wm. J. Brennan
Associate Justice of the

- 241a -

Supreme Court of the United
States

Dated this 14
day of May, 1990.

41
No. 89-1972

FILED
OCT 2 1990

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JAMES B. DANIELS, AN ATTORNEY-AT-LAW
OF THE STATE OF NEW JERSEY,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF NEW JERSEY,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY**

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Division of Criminal Justice

*Of Counsel &
On The Petition*

QUESTIONS PRESENTED

1. Whether petitioner's voluntary payment of the fine, which was the only punishment imposed in the contempt judgment on *de novo* review by the Superior Court of New Jersey, Appellate Division, renders this petition moot?
2. Whether petitioner may attack the constitutionality of a state statute as vague and overbroad without having raised these claims in the state courts?
3. Whether the state Supreme Court's interpretation of the statutory definition of contempt, requiring an imminent and direct tendency to obstruct justice, violated petitioner's right to due process?
4. Whether the state court's factual findings were sufficient to support the contempt adjudication against claims that petitioner's conduct was protected by the first amendment right to freedom of speech and the sixth amendment right of petitioner's former client to vigorous representation of counsel?
5. Whether an experienced criminal trial attorney cited for direct contempt in the face of the court should be permitted to frustrate proceedings designed to restore order in the courtroom by claiming the right to assistance of counsel at a summary contempt hearing?
6. Whether *ex parte* affidavits by petitioner and a court attendant submitted by petitioner's counsel on *de novo* appeal of a summary contempt adjudication were admissible to convert the matter from a direct contempt to an indirect contempt proceeding, entitling petitioner to a full evidentiary hearing?

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COUNTER-STATEMENT OF THE CASE

A. Procedural History

At a hearing on March 18, 1986, petitioner interrupted the trial court's ruling on a defense motion with derisive laughter and offensively disrespectful physical gestures designed to provoke a response and disrupt the proceedings in a blatant effort to influence subsequent rulings. The court warned petitioner that such conduct was unacceptable and if it continued, the court would take appropriate action. Petitioner's belligerent response to the trial court's warning necessitated a sterner second warning that further misbehavior would result in a contempt citation. (T90-16 to 91-11). After a recess petitioner apologized. (T91-18 to 22). However, on the following day, March 19, 1986, petitioner again interrupted the court's ruling on another motion with a similarly egregious demonstration of disrespect. (2T127-18 to 128-9). As the court was admonishing petitioner, he interrupted the proceedings by jumping to his feet, angrily denying the conduct observed by the court, and stating that he was tired of such criticism. It was at this point that the court cited petitioner for contempt and afforded him the opportunity to address the issue of intent and the sentence. (2T128-13 to 129-30). Petitioner was adjudged in contempt and sentenced to two days in county jail and a fine of \$500. (2T132-20 to 133-8).

Shortly thereafter, petitioner submitted a form of order which failed to conform with the requirements of *N.J. Ct. R. 1:10-1*, but the court signed the order (Pa205) as an accommodation to petitioner since there was no secretarial assistance available to make additions. (Pa210). Later that day petitioner filed an appeal and obtained a stay. (Pa207). The trial court filed an Order of Contempt and Certification on March 24, 1986. (Pa209). Petitioner did not object to the form or contents of the Order of Contempt and Certification, nor did he file a timely motion for new trial pursuant to *N.J. Ct. R. 3:20-2*.

On May 2, 1986 petitioner moved to supplement the appellate record with his own *ex parte* affidavit (Pa231)

and the affidavit of a court attendant, James Tighe. (Pa236). Alternatively, petitioner requested a remand to take testimony, which was tantamount to an untimely motion for new trial. Respondent opposed this motion since petitioner was seeking to convert this direct contempt into an indirect contempt proceeding to obtain a full evidentiary hearing. In orders dated May 22 and June 2, 1986 (Pa229), the Appellate Division granted petitioner's motion to supplement the record with these affidavits but denied his alternative request for remand to take testimony. On June 11, 1986, respondent moved to supplement the record with an affidavit of the trial prosecutor, Thomas Simon, which corroborated the trial court's certification and showed that petitioner's affidavit of May 2, 1986 deliberately misrepresented a conversation with an eyewitness and completely altered its meaning. The Appellate Division granted respondent's motion on July 10, 1986.

The Appellate Division filed its opinion on July 30, 1987, finding petitioner guilty of contempt and imposing a fine of \$500. It deemed the fine adequate punishment and vacated the custodial portion of the sentence imposed by the trial court. (Pa67). *Matter of Daniels*, 219 N.J. Super. 550, 530 A.2d 1260 (App. Div. 1987). Petitioner voluntarily paid this fine on or about August 10, 1987.

Petitioner filed a Notice of Petition for Certification and Notice of Appeal to the Supreme Court of New Jersey on August 21, 1987. On February 28, 1990, the Supreme Court of New Jersey filed its opinion affirming the judgment of the Appellate Division. (Pa1). *Matter of Daniels*, 118 N.J. 51, 570 A.2d 416 (1990).

B. Statement of Facts

During the first day of pretrial hearings in a robbery case, petitioner engaged in a prolonged effort to relitigate denials of his repeated motions seeking admission of unstipulated defense polygraph evidence. The trial judge was indulgent of petitioner's refusal to accept the court's rulings and his defiance of court directions to limit and terminate this repetitive argument. (Pa162). Petitioner's

conduct, however, degenerated and culminated in a blatantly disrespectful display of disagreement that disrupted the court proceedings as the trial judge was rendering a ruling on the issue. Petitioner candidly admitted in his Appellate Division brief (at p. 14) that he disrupted the court's ruling with his rude non-verbal conduct to demonstrate his disagreement in an attempt to "influence subsequent decisions" in the case. This demonstration consisted of mocking laughter audible to the trial judge and the prosecutor and offensively disruptive physical gestures including shaking his head, holding his head down, moving about in his seat and rolling his eyes. (T90-22 to 24; 2T129-15 to 18; Pa211). Even as petitioner demonstrated this disrespect and "flaunted the court's authority" (Pa162), the trial judge exercised commendable restraint, properly warning petitioner:

Mr. Daniels, I frankly don't care about your response but if you continue to do that, sir, I'm going to take appropriate action. (T90-16 to 18).

Petitioner's response to this warning was belligerently defiant, in the Appellate Division's view daring the court to take further action (Pa163):

Your Honor, go right ahead, take whatever appropriate action Your Honor deems necessary. (T90-19 to 21).

In his certification the trial court described petitioner's disrespectful, sarcastic tone of voice (Pa213), but the judge endeavored to defuse the situation rather than react to petitioner's provoking words. (*Id.*; see also Pa95). Thus, the judge issued a sterner second warning. (T90-24 to 91-11). Following a recess, petitioner apologized.

During continuation of these pretrial proceedings the next day, March 19, 1986, however, petitioner defied the court's directive and repeated his misbehavior, again rudely disrupting the trial court's ruling with a similar non-verbal demonstration of disagreement. Again, petitioner's mocking laughter was audible to the trial judge, and petitioner

engaged in offensive physical gestures, throwing himself back in his chair, rolling his head, and covering his eyes. (2T128-7 to 9; Pa213; see also Pa95).

In his affidavit supplementing the record in the Appellate Division, Assistant Prosecutor Thomas Simon corroborated the court's description of petitioner's misconduct:

I was seated at counsel table as the judge was making his ruling. I was straining at times to hear the Judge. As I was watching the Judge, I saw the Judge direct his attention to Mr. Daniels, who was seated at defense counsel's table. As the Judge turned toward him I also turned and looked at Mr. Daniels. As I did, I could see that Mr. Daniels was seated in his chair waving his hands, shaking his head, and making laughing gestures (although I could hear no laughing).

The prosecutor explained why he had difficulty hearing the judge and could not hear petitioner's laughter:

It should be noted that the courtroom conditions at that time made it necessary for several windows to be open. The Court was located on the thirteenth floor of the Union County Court House, and it was quite windy. The audibility was quite poor in the Court at that time.

It is understandable that some eyewitnesses may not have been able to hear audible laughter. The Appellate Division found no conflict in any material respect among the affidavits of Tighe, Simon and Daniels, the transcript of the proceedings and the judge's certification of March 24, 1986. (Pa117-119).

In response to petitioner's disruptive conduct, the judge began to admonish petitioner, but before he could finish describing petitioner's misbehavior for the record, petitioner jumped up from his seat and rudely interrupted the court (Pa216) to voice his angry denial and declare that he was tired of the court's criticism:

Judge, I didn't, I did neither of these things (sic), none of them, zero. And I'm tired of this kind of stuff. (2T128-10 to 12).

Since petitioner refused to accept criticism or to control his misbehavior in accordance with the prior warnings, the trial court cited petitioner for contempt:

I find you in contempt of court. You'll be able to respond right now. (2T128-13 to 14).

This citation was followed by petitioner's angry tirade which confirmed his contemptuous intent.

In his certification the trial judge explained that although he used the term "find" on several occasions, his use of this term initially was in effect a notification of the contempt citation. It was not until after petitioner was given an opportunity to be heard with regard to his *mens rea* and sentencing that he was actually held to be in contempt of court. (Pa215-216).

Offered this opportunity to explain his conduct, petitioner emitted another scornful laugh (Pa217), and the court observed on the record, "I find you are laughing and smiling again." (2T129-20). Petitioner launched into an angry rationalization of his conduct (Pa217), accusing the court of bias against him and acting as "a second prosecutor throughout these proceedings." (2T129-24 to 130-5). Petitioner vacillated between completely denying any misbehavior and admitting his physical gestures of throwing himself back, covering his eyes and nodding his head. Again, petitioner attempted to rationalize his demonstration as a human reaction to his disappointment with the ongoing court rulings. His explanation became so angry and heated that the judge found it necessary to admonish petitioner to lower his voice. Petitioner responded,

I'm sorry, I am obviously human and angry. I'm trying to show the most respect that I can for this Court." (2T130-25 to 131-10).

Petitioner emphasized the word "this," and the inflection of his voice was disrespectful and offensive. (Pa217-218).

He became more sarcastic, also observing that his disagreements with the court were part of "the nature of the game" and that this display of disagreement was his responsibility and function as advocate for his client. (2T131-11 to 132-5). Thus, he again confirmed that his behavior was willful and designed to influence the court. The trial court found petitioner's attempt to prove a lack of *mens rea* disingenuous. (Pa218; see also Pa97).

In reviewing petitioner's explanation for his behavior, the Appellate Division found "the manner in which [petitioner] addressed the trial court when given the opportunity to be heard was likewise insolent. Thus, the trial judge was warranted in holding [petitioner] in contempt." (Pa163). The Appellate Division also found that petitioner gave a lengthy explanation for his conduct, thus enjoying a full right of allocution, and "[h]is assertion to the contrary is unfounded." (Pa137).

At the conclusion of petitioner's "tirade," the trial court inquired if petitioner wished to say anything further in his defense. When he said "No," the court asked if he wished to call any witnesses. Instead of answering this question, petitioner asked for a few moments. (2T132-6 to 12). The court pressed him for an answer, but petitioner again avoided the question by responding, "I would like to consult with an attorney." (2T132-13 to 16). The Court reminded petitioner that it was a summary contempt hearing and asked a third time, "Do you want to call a witness?" Petitioner immediately responded, "No." (2T132-17 to 19). Thus, petitioner declined to offer any additional evidence or call any witnesses when given the opportunity to do so. (Pa219).

The trial court proceeded to render findings holding petitioner in contempt and sentencing him. (2T132-20 to 133-10). The court instructed the bailiff to bring out the unsworn jury, and the court discharged the jury after the termination of the contempt adjudication. (2T133-11 to 22).

REASONS FOR DENYING THE WRIT

POINT I

PETITIONER'S VOLUNTARY PAYMENT OF THE FINE, WHICH WAS THE ONLY PUNISHMENT IMPOSED IN THE CONTEMPT JUDGMENT ON DE NOVO REVIEW BY THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, RENDERS THIS PETITION MOOT.

Petitioner remitted payment of the fine imposed by the Appellate Division in the form of a check to the Union County Court Clerk dated August 10, 1987, apparently without reservation or protest. It is noteworthy that the judgment did not provide for commitment to jail for non-payment of the fine. The remedy for non-payment of a fine requires a motion by the person authorized to collect payment and a hearing. *N.J.Stat.Ann.* 2C:46-2. Petitioner was not impeded or prevented by any procedure from taking those steps necessary to preserve a subject matter on which the judgment of this Court could operate. Immediately after the judgment of contempt he took advantage of the court rule, *N.J. Ct. R.* 2:9-5(a), permitting a stay of sentence pending his appeal to the Appellate Division. (Pa 207). Obviously, he could have applied for continuation of the stay pending his appeal to the Supreme Court of New Jersey and to this Court, but he voluntarily chose not to do so. Under these circumstances petitioner did not exercise available procedures to maintain a live case or controversy, and the appeal is moot.

The Constitution confines the jurisdiction of this Court, indeed all federal court jurisdiction, to "cases" and "controversies." U.S. Const. Art. III, sec. 2. Generally, a case becomes moot, and therefore, nonjusticiable as involving no case or controversy, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 396 (1980), quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969). In this case a reversal of the judgment of the Superior Court of New Jer-

sey will provide petitioner with no actual, affirmative relief, since the sentence has already been executed. *E.g.*, *Taylor v. United States*, 410 F.2d 392 (5th Cir. 1969) (payment of fine moots appeal); *accord*, *United States v. Lee*, 404 F.2d 68 (5th Cir. 1968); *Murrell v. United States*, 253 F.2d 267 (5th Cir. 1958), *cert. den.* 358 U.S. 841 (1958); *D'Aloia v. City of Summit*, 89 N.J.L. 711, 99 A. 1070 (E. & A. 1916); *Westfield v. Stein*, 113 N.J.L. 1, 172 A. 522 (Sup. Ct. 1934); *State v. Heath*, 18 N.J. Misc. 471, 15 A.2d 92 (Cty. Ct. 1940); Annotation, *Appealability of Contempt Adjudication or Conviction*, 33 A.L.R.3d 448, 573 (1970).

Of course, the seminal case on this issue was *St. Pierre v. United States*, 319 U.S. 41 (1943). It held that completion of a six month sentence for contempt prior to argument on the merits of the appeal from the contempt conviction rendered the appeal moot, stating "the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate." *Id.* at 42. In *dicta* *St. Pierre* recognized two possible exceptions to the mootness doctrine, and these exceptions have evolved and have been expanded in subsequent case law. The first exception exists where the State effectively denies the appellant access to its appellate courts before expiration of the sentence, preventing an opportunity to preserve a subject matter on which the judgment of the court can operate; the second exception permits adjudication of the merits where either state or federal law provide for collateral legal consequences on the basis of the challenged conviction. *Sibron v. New York*, 392 U.S. 40, 51-55 (1968), citing *St. Pierre v. United States*, *supra*. While *Sibron* did not overrule *St. Pierre*, the Court there cautioned that *St. Pierre* "must be read in [the] light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." 392 U.S. at 57; *accord*, *Pennsylvania v. Mimms*, 434 U.S. 106, 109 n.3 (1977). *Sibron* and

Mimms, however, do not preclude respondent from rebutting the presumption of collateral legal consequences.

As the Supreme Court of New Jersey held in this matter:

We find in the circumstances of this case that the attorney has not suffered a consequence of magnitude by virtue of the appellate disposition. The adjudication of contempt is not an adjudication of criminal conduct on the part of the attorney. (Pa62).

See also *In re Buehrer*, 50 N.J. 501, 518, 236 A.2d 592, 601 (1967). Nothing could be clearer: petitioner has not been adjudged guilty of criminal conduct. Indeed, under the state criminal code a criminal "offense" is expressly defined to mean "a crime, a disorderly persons offense or a petty disorderly offense unless a particular section in this code is intended to apply to less than all three." *N.J.Stat.Ann.* 2C:1-14(k); see also *N.J.Stat.Ann.* 2C:1-4(b). A contempt adjudication under the court rule does not fall within these definitions, and a person adjudged in contempt under the court rule does not suffer the collateral legal consequences ordinarily associated with a criminal conviction.

In this respect petitioner is not subject to impeachment in any proceeding or matter under the provision of *N.J.Stat.Ann.* 2A:81-12. There is no statutory provision for any legal disqualification or disability based on an adjudication of contempt. *N.J.Stat.Ann.* 2C:51-1. The judgment does not constitute a prior criminal record, a potential aggravating factor in a sentencing proceeding, and it could not be considered to enhance a subsequent conviction. *N.J.Stat.Ann.* 2C:44-1(a). While theoretically petitioner's conduct might be the subject of future disciplinary action or might be considered by a future employer or a bar admission authority, such actions would not be governed by any recorded judgment but would be more directly influenced by the underlying conduct that formed the basis of the judgment. See *Lane v. Williams*, 455 U.S. 624, 633-634 (1982). Moreover, in the four years since this matter

arose, no disciplinary action has ensued. The matter has been laid to rest because the Appellate Division felt the fine and rebuke in open court "undoubtedly impressed upon [petitioner] the seriousness of his conduct and should deter him from similar acts in the future." (Pa179-180). The potential for moral stigma, in contrast to a possible loss of legal rights, is not sufficient to avoid mootness. *St. Pierre v. United States*, 319 U.S. at 43; *United States v. Johnson*, 801 F.2d 597, 600 (2d Cir. 1986).

Surely, petitioner cannot seriously contend that a claim to reimbursement presents this Court with a special and important ground for *certiorari* when he did not exercise available measures to preserve a live case or controversy but voluntarily remitted payment of the nominal fine without coercion or protest. Since mootness is a jurisdictional issue, the petition should be dismissed.

POINT II

THE DEFINITION OF CONTEMPT IN FACIA CURIAE ANNOUNCED BY THE STATE SUPREME COURT PASSES CONSTITUTIONAL MUSTER.

Petitioner broadly claims that his derivative constitutional right of vigorous advocacy and his right of free expression were violated by the definition of contempt in *facia curiae* employed by the Supreme Court of New Jersey in this matter. His method of analysis is greatly flawed by a mischaracterization of the holding below, and his liberal intermixing of inapposite authorities that address indirect contempt, i.e. for conduct occurring outside the courtroom which is not seen by the judge. Petitioner presents the conclusory contention that the opinion below contains unbridled standards, that it delegates an unacceptable level of discretion and that it fosters arbitrary and discriminatory application. Examining the opinion below, it is plain that the definition is not open-ended and expansive as petitioner contends.

The state Supreme Court began by acknowledging that the power to punish summarily for contempt is an ex-

traordinary power to be exercised sparingly and only in the rarest of circumstances, that necessity "justifies the summary contempt power, but also limits that power by defining both settings for its exercise and procedural safeguards." (Pa29). The opinion incorporated all of the constitutional limitations and procedural requirements with respect to the contempt power that this Court has enunciated, repeating the primary limitations in a list of six steps the state courts must take in the course of determining whether to invoke the contempt power and if summary procedures are necessary. (Pa44-48). Thus, the Court explained and provided explicit guidelines concerning these constitutional restrictions on the summary contempt power, encouraging the state courts to employ alternative measures if practicable to avoid the need for adjudication.

In applying these principles to this case, the state Supreme Court agreed "substantially with the reasoning of the dissenting member of the Appellate Division and the result of the majority." (Pa48). We must turn to the reasoning of the dissent to fully appreciate the state Supreme Court holding. The dissent explained that while the common law definition of contempt has been expressed in more expansive terms than the federal courts, any difference is more semantic than substantive:

... it is important not to overstate the magnitude of the difference between the federal and New Jersey standards for contempt. Our cases state as strongly as the federal cases that the summary contempt power should be invoked only in circumstances where it is necessary. Compare *Taylor v. Hayes*, 418 U.S. 488, 496-500, 94 S.Ct. 2697, 2702-2704, 41 L.Ed.2d 897 (1974) and *Harris v. United States*, 282 U.S. 162, 167, 86 S.Ct. 352, 355, 15 L.Ed.2d 240 (1965) with *In re Yengo*, 84 N.J. 111, 122[, 417 A.2d 533] (1980), cert. den. 449 U.S. 1124, 101 S.Ct. 941, 67 L.Ed.2d 110 (1981) and *In re Mattera*, [34 N.J. 259, 272, 168 A.2d 38 (1961)]. Furthermore, there are federal constitutional limitations upon a state court's exercise of the summary contempt power. See, e.g., *Eaton v. Tulsa*,

[415 U.S. 697 (1974)]; *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); *Holt v. Virginia*, 381 U.S. 131, 85 S.Ct. 1375, 14 L.Ed.2d 290 (1965); *In re Little*, 404 U.S. 553, 92 S.Ct. 659, 30 L.Ed.2d 708 (1972). For a party's conduct to be punishable as contempt, it "... must constitute an imminent, not merely a likely, threat to the administration of justice." *Eaton v. Tulsa*, *supra*, 415 U.S. at 698, 94 S.Ct. at 1229, quoting *Craig v. Harney*, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed.2d 1546 (1947).

* * *

Therefore, while I agree with the majority's conclusion that conduct in our courts which has a "tendency to" obstruct the administration of justice may be contempt, I would conclude that the tendency must be immediate and direct before the "necessity" for invocation of the contempt power can arise. (Pa186-189).

In his brief to the state Supreme Court (at p.24), petitioner acknowledged that

Judge Skillman [the dissent] may well be correct that there is little difference between the two standards. His conclusion that under this State's standard the contempt power cannot be invoked unless conduct has an immediate and direct tendency to obstruct the administration of justice ... may, as interpreted, coincide precisely with the federal standard.

Petitioner argued that under Judge Skillman's standard, and under the New Jersey cases, his conduct would not constitute contempt. Both the majority and the dissent rejected petitioner's position and found that petitioner's conduct was in the presence of the court and was subject to summary adjudication as an immediate and direct obstruction. (Pa180). Judge Skillman parted company with the majority only with respect to his conclusion that the two supplemental affidavits created a sufficient dispute

about the audibility of petitioner's laughter to convert the matter from a direct to an indirect contempt, requiring a remand for a full plenary hearing.

Applying the reasoning of the dissent on the definition of contempt, the state Supreme Court held that "if the underlying conduct occurred as found, the judgment of contempt was warranted." (Pa48). The Court had noted,

When an attorney's conduct in the actual presence of the court has the *capacity to undermine the court's authority and to interfere with or obstruct the orderly administration of justice*, there can be no alternative but that a trial court assume responsibility to maintain order in the courtroom. (emphasis added) (Pa28)

Petitioner extracts the phrase "capacity to undermine" out of context in support of his contention that the definition is open-ended and expansive, when it is clear from the opinion that it included the requirement of obstruction and applied the test from the dissent which petitioner had told the Court "may well be correct" and "coincides precisely with the federal standard." If petitioner's legal posturing is disregarded, it is obvious that his real dispute is with the factual findings of the state courts and not with the minor differences between the definition of contempt in the state and federal systems.

A. The New Jersey Definition of Contempt Is Neither Vague Nor Overbroad.

Petitioner claims for the first time that the statutory definition of contempt in *N.J.Stat.Ann.* 2A:10-1, as construed by the opinions below, is unconstitutionally vague and overbroad. Aside from the fact that petitioner argued before the state Supreme Court that Judge Skillman's definition was correct, it is also readily apparent that no claim of vagueness or overbreadth was raised or presented below. Since the issue was not raised before the state courts, it should not be cognizable in this Court. *Ellis v. Dixon*, 349 U.S. 458, 460 (1955).

Furthermore, respondent submits that the state statutory definition, if not the functional equivalent of the federal test, is sufficiently certain to pass constitutional vagueness and overbreadth standards either facially or as applied in this matter. The reasoning of the dissent concerning the definition of contempt, as incorporated in the state Supreme Court's opinion, requires an immediate and direct tendency to obstruct. It was this standard which the state Supreme Court indicated that it applied on *de novo* review pursuant to *N.J.Ct.R.* 2:10-4. The term "tendency" in this context obviously contemplates a conscious act designed to obstruct or readily resulting in the obstruction of the proceedings. But as noted, this tendency must be direct and immediate. Judge Skillman emphasized that the threat must be imminent, not merely likely, before the necessity for invocation of the contempt power can arise. Thus, inclusion of the term tendency does not significantly broaden the definition of contempt, particularly when we examine the definition of the term obstruction. Even the federal courts utilize the term "obstruction of the administration of justice" to encompass any act in the presence of the court that interrupts the orderly process of the administration of justice, disrupts a hearing or thwarts the judicial process. *E.g., Vaughn v. City of Flint*, 752 F.2d 1160, 1167 (6th Cir. 1985). Petitioner's argument that there would have been no obstruction of the proceeding in this case if the court had not reacted to the disturbance is disingenuous. Obstruction entails the observation by the court of misconduct disrupting the proceedings. Indeed, this Court limits the summary contempt power to

charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority * * * before the public.

In re Oliver, 333 U.S. 257, 275 (1948), quoting *Cooke v. United States*, 267 U.S. 517 (1925).

The types of behavior that may cause a disruption vary across a broad spectrum. (See Pa41-42). Given this wide gamut of misconduct that may occur in a variety of contexts and with varying degrees of intensity, it has been found practicable to accord some sound measure of discretion in our judges to deal with obstructive behavior, guided by case-by-case examples of the sound exercise of discretion. This discretion is implicit in the definitional language of contempt, even under the federal contempt statute. Its presence does not render these definitions vague or overbroad in the legal sense, since it does not chill protected speech. Indeed, since the common law definitions of contempt are utilized in a majority of jurisdictions (see respondent's merits brief to the New Jersey Supreme Court at pp. 21 to 24), it is plain that there has been no real question about the meaning of this language. In those cases which have directly raised and addressed this issue, similar contempt statutes have been upheld against vagueness and overbreadth challenges. *E.g.*, *Matter of Paul*, 28 N.C. App. 610, 222 S.E.2d 479, 485 (1976), cert. den. and app. dis. 289 N.C. 614, 223 S.E.2d 767 (1976).

Rather than address the standards governing vagueness claims, petitioner diverges into an analysis of this Court's decisions interpreting the limitations of 18 U.S.C. § 401(1), arguing that the federal statute has been construed to require an actual obstruction, and deducing that a tendency to obstruct would not be sufficient. While he may be correct in his analysis of federal statutory construction, respondent fails to appreciate how that governs constitutional claims of vagueness and overbreadth.

The federal contempt power was significantly curtailed in the Act of 1831, 4 Stat. 487 (predecessor to 18 U.S.C. § 401), which was passed in reaction to the controversial impeachment proceedings against Judge James R. Peck. He had imprisoned and disbarred in a summary proceeding a lawyer who published an indirect, out-of-court criticism

of a decision of the judge then on appeal. See *Perkins Criminal Law*, Chap. 5, sec. 3 at pp. 532-540 (1909). To preclude the perceived abuse Congress limited the federal contempt power to behavior that in some manner "actually obstruct[s] the district judge in 'the performance of judicial duty.'" *In re McConnell*, 370 U.S. 230, 234 (1962).

It is clear that in the federal system, Congress has the authority to regulate within limits the use of the contempt sanction by inferior federal courts, this authority arising from Congress' authority as the creating agency of the lower federal courts. *Young v. United States ex rel. Veltion et Fils S.A.*, 481 U.S. 787, 799 (1987); *Michoudson v. United States*, 266 U.S. 42, 65-66 (1924). This proposition was first expressed in *Ex parte Robinson*, 86 U.S. 505, 509-511 (1872) where in upholding the constitutionality of the 1821 federal act, this Court expressed doubt whether the statute can be held to limit the constitutionally-derived power of this Court, but held that there "can be no question" of its applicability to the lower federal courts which were "created by act of Congress."

In the exercise of the contempt power, however, a distinction has been recognized as between courts of constitutional origin and those of legislative origin. In courts of constitutional origin this power is said to exist independent of statute. Thus, the power to punish for contempt, including the power to inflict summary punishment, is a right inherent in the courts and is derived from and incidental to the constitutional grant of judicial power. *E.g.*, *Young v. United States ex rel. Veltion et Fils S.A.*, 481 U.S. at 795-796; see *In re Tange*, 68 N.J. at 200, 627 A.2d at 688. Its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of judgments, orders and writs of the court, and consequently, to the due administration of justice. It is an essential element of judicial independence and authority. See *Ex Parte Corcoran*, 505 S.W.2d 641, 645 (Tex. 1973).

Simply because the federal courts construe the federal statute to require "actual obstruction" does not constitute

tionalize that phrase. Petitioner's reliance on *In re McConnell*, *supra*, is misplaced, since that decision did not address vagueness and overbreadth claims. *McConnell* involved an adjudication of contempt by a federal district court, and this Court granted *certiorari* with specific reference to its supervisory authority over inferior federal courts to emphasize the "importance of assuring alert self-restraint in the exercise by district judges of the summary power of punishing contempt." 270 U.S. at 232. This Court proceeded to recite the 18 U.S.C. § 401 definition of contempt and its history in federal courts. It was in this context that the Court spoke of the statutory requirement of an actual obstruction of justice:

And we held long ago, in *Ex parte Hudgings*, that while this statute undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business, it also means that before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice. . . (Footnote omitted) (270 U.S. at 232).

Thus, the quoted language refers to congressional intent manifested in the statute and applies the term "obstruction" in the broad sense utilized in *Ex parte Hudgings*, 263 U.S. 878 (1923). There is no indication of any intent to diminish the definition of contempt utilized by state courts. See *Ex Parte Kraybill*, 712 S.W.2d 266, 270 (Tex. App. 1986), *cert. den.*, 473 U.S. 1202 (1985).

Petitioner's reliance on *In re Little*, *supra* and *Ex parte Tolan*, *supra*, is similarly misplaced. Those decisions were premised on the holding in *State v. Virginia*, *supra*, which permitted a litigant to allege an appropriate motion and argument that a judge was biased. Similar argument in the *pro se* affidavit in *Little* was not considered contempt because "[t]he *pro se* . . . clearly entitled to as much latitude in conducting his defense as we have held to be accorded by counsel vigorously representing a client's cause."¹

404 U.S. at 556. References in *Little* to the Court's opinion in *McConnell and Craig v. Harney*, *supra*, were merely illustrative of the latitude afforded counsel and were not intended to impose the federal statutory definition of contempt on the states. Similarly, Eaton's single isolated usage of street vernacular in answering a question on cross-examination at his municipal court trial was also considered protected by the *Holt* rationale, since it was not directed at the judge or any officer of the court, did not disobey any valid court order, was not loud or boisterous, and did not attempt to prevent the judge or any other officer of the court from carrying out his court duties. *Eaton v. City of Tulsa*, 415 U.S. at 699. As Justice Powell clarified in his concurring opinion in *Eaton*,

But the controlling fact, in my view, and the one that should be emphasized, is that petitioner received no prior warning or caution from the trial judge with respect to court etiquette. It may well be, in view of the contemporary standards as to the use of vulgar and even profane language, that this particular petitioner had no reason to believe that this expletive would be offensive or in any way disruptive of proper courtroom decorum. Language likely to offend the sensibility of some listeners is now fairly commonplace in many social gatherings as well as in public performances.

I place a high premium on the importance of maintaining civility and good order in the courtroom. But before there is cause to the summary remedy of criminal contempt, the court at least owes the party concerned some sort of notice or warning. No doubt there are circumstances in which a courtroom outburst is so egregious as to justify a summary response by the judge without specific warning, but this is surely not such a case. (415 U.S. at 701, 702).

Thus, it was the absence of any warning or caution directed to Eaton from such isolated misconduct which conditioned the holding in *Little* and *Eaton*. See also *Winters*

of Pillsbury, 844 F.2d 22 (3d Cir. 1999); *In re Hallinan*, 71 Cal. 2d 1179, 450 P.2d 255, 258, 81 Cal. Rptr. 1, 4 (1969); *State v. Goeller*, 263 N.W.2d 26 (N.D. 1979).

The state Supreme Court addressed this issue and found that petitioner had been expressly warned not to repeat his misbehavior. (Pa52-53). Thus, petitioner could not claim surprise or a lack of familiarity with courtroom etiquette and the necessity for decorum. This is not a case in which the defendant can claim that the statute was vague or overbroad as applied in that he did not know before the fact that his behavior was punishable; he was expressly warned. Furthermore, petitioner clearly understood the trial judge's perception of his conduct, as demonstrated during his angry tirade in which he admitted most of the conduct. See *Pennsylvania v. Local Union 542, International Union of Operating Eng'rs*, 52 F.2d 490, 512 n. 204 (3d Cir.), cert. den. 454 U.S. 822 (1977). As the state Supreme Court found, "There was no dilution of advocacy here." (Pa54). Moreover, a lawyer who engages in mocking laughter and gestures, jumps up, interrupts and angrily rejects the court's criticism and effort at restoring order, and insults the court in a loud and angry tirade cannot claim an absolute right to First Amendment freedoms. The right of free speech has always been subject to justifiable exception in the courtroom acting to maintain public respect for the institution and uphold the orderly transaction of business. Petitioner's conduct simply does not fall within the type of permissible behavior sanctioned by *Holt* and its progeny. Furthermore, petitioner's conduct was not a mere affront to the authority of the trial judge; it directly interrupted, disrupted and interfered with the court in its orderly processing of the business before it, leading to disruption and delay and which petitioner engaged in as insulting conduct. It was intentionally directed against the dignity and authority of a court.

B. The State Court's Factual Findings Were Sufficient To Support The Contempt Adjudication.

Petitioner argues (at 9-10), that "here nothing more than personal disrespect or insulting conduct is involved,

it should not be punished when it falls short of interfering with the nature of the trial." Thus, he asks this Court to overturn the adjudication of contempt allegedly because the facts are insufficient to support the judgment as a matter of law. In this respect petitioner misconstrues the rule of this Court. It is not the practice of this Court to grant *certiorari* to review evidence and discuss specific facts. *Texas v. Mead*, 465 U.S. 1041 (1984) (Stewart, J.); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

A federal constitutional claim implicates the due process clause only "if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 325 (1979); *Sandier v. United States*, 572 A.2d 86, 89 (D.C. App. 1990). Of course, the authority of the states to make the conduct at issue contempt is, as discussed above, a distinct question. The appellate court must review the record in the light most favorable to the prosecution in determining whether a rational factfinder readily could have found petitioner guilty of contempt beyond a reasonable doubt. Thus, petitioner's efforts to minimize his conduct should not weigh in the process. Rather, the facts as found should be the focus of attention. Those facts, which are recited at length in the Counter-Statement of Facts, *supra*, and incorporated here, more than satisfy the *Jackson* standard.

POINT II

THE CHAIRMAN'S ADJUDICATION OF CONTEMPT WAS
ARBITRARY AND PREJUDICIAL BECAUSE THE
RECORD OF ALL PROCEEDINGS, SUCH AS WERE
IT WAS DISCLOSED.

Petitioner incorrectly questions the opinion of the state Supreme Court as authorizing summary procedure in an emergency circumstance. He criticizes this Court for failing to establish with precision the dividing line that marks the constitutional limit of the power to proceed summarily, and he seeks to establish an exception to summary con-

tempt procedures to permit conversion of a direct contempt to an indirect contempt proceeding whenever a contemnor alleges on appeal a factual dispute concerning his "good-faith" explanation for his conduct in *ex parte* supplemental affidavits. Respondent submits that none of these claims warrants the grant of certiorari.

At the very outset of its opinion the state Supreme Court acknowledged that necessity is the sole credible basis for the summary contempt process. (Pa19). Thus, it observed that

Necessity not only justifies the summary contempt power, but also limits that power by defining both settings for its exercise and procedural safeguards. *In re Fair Loan Edw. Ass'n.*, 68 N.J. 112, 114-15, 305 A.2d 72 (1973). (Pa29-30).

As the Court explained in *Fair Loan*,

... since the summary contempt process lends itself to arbitrary action, the power has been increasingly circumscribed, and this in two ways. One is by the careful recourse to the reason for the summary power, i.e., the need for it, to the end that a summary power be not invoked beyond that need. Indeed the summary category referred to above evolved out of a grand debate with respect to that underlying necessity. The other safeguard against the risk of arbitrariness consists of procedural requirements designed as antidotes to that risk.

With respect to procedural antidotes, our practice in contempt matters is calculated to limit the risk of arbitrariness and the appearance of arbitrariness. (68 N.J. at 115, 305 A.2d at 75).

The state Supreme Court also expressly incorporated the standards on the use of the contempt power espoused by the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Judge's Role in Dealing with Trial Objections (May 1973). It listing the steps that a court should follow in evaluating whether

it calls for immediate adjudication, the state Supreme Court focused on the degree of the contempt, alluding to this Court's words in *Cooke v. United States*, *supra*, when it spoke of conduct in open court that would cause "demoralization of the court's authority" before the public. (Pc45). And as related in Point II, *supra*, the state Supreme Court also adopted the reasoning of the dissent in the Appellate Division, which underscored that the conduct must have an immediate and direct tendency to obstruct before the "necessity" for invocation of the contempt power can arise. (Pc149).

In short, petitioner's argument is premised on a misreading of the opinion below, which did not occur in a vacuum but is built upon a lengthy history of compatible state and federal decisional law that is fully protective of the constitutional concerns for due process in instances when the court is called upon to evaluate the necessity for summary punishment. Moreover, petitioner's criticism of this necessity rationale is an exercise in explicit double-speak, attacking this Court's test that evaluates the necessity of summary action for failure to consider whether the petitioner would have benefited from "particular" procedural safeguards, while conversely attacking the integrity of the trial court's personal observation of the conduct as discouraging careful consideration of the existence of "necessity" for summary action. Respondent submits that the state courts properly applied the controlling constitutional standards which balance the nature of the liberty interest involved and the degree of reliability required in the fact-finding process. Petitioner's effort to develop a mechanistic definition of necessity is unrealistic and would negate the courts of the latitude to handle courtroom disruptions that has proven effective in the past.

Petitioner's effort to curtail summary contempt comes at a time when such incidents of attorney misconduct are becoming commonplace. The state Supreme Court alluded to the frequency of such misbehavior, lamenting that the facts before it were "not particularly unusual," and that "[t]hey disclose the kind of conduct that might occur any

day in a courtroom." (P26). Petitioner's behavior is representative of attorneys who are engaging in discourtesy, abuse, intimidation, and disrespect in the courtroom as a normal strategy, as a technique to wear down the opposition and the court, not as a matter of advocacy but by bullying and insult. If petitioner succeeds in getting this Court to endorse such behavior as acceptable advocacy, the fundamental role of our courts to provide an impartial forum for adjudication of disputes through the process of orderly trial is threatened. In respondent's view petitioner received due process for conduct that was a willful, open defiance of a valid court order, behavior that was rude, intentionally disruptive and a direct and immediate obstruction of the proceeding.

A. Summary Proceedings Forewent to N.J. C.L.E. 1:10-1 Were Necessary and Justified In This Matter.

Essentially, petitioner is asking this Court to apply well established constitutional standards governing necessity for summary adjudication to the particular facts of this case. He argues that even if his non-verbal laughter and gestures, his jumping up to rudely interrupt the court's description of his misconduct and deny it, and his rejection of the court's criticism on the ground that he was tired of it, constituted an "actual obstruction," his conduct was not so threatening to meet the necessity threshold. Again, he has a mistaken conception of the role of this Court, which does not engage in the practice of superior fact-finding, reviewing evidence and discussing specific facts of state court actions. *Price v. Wood*, *supra*; *United States v. Johnson*, *supra*. All of the judges below agreed that if the underlying conduct occurred as found, the summary judgment of contempt was warranted. As noted previously, a fair review of the evidence in a light most favorable to respondent readily indicates that the state court factfinder could have found petitioner's conduct sufficiently egregious to warrant summary punishment. Petitioner's efforts to minimize his culpability should not weigh in the process.

B. Petitioner's *Ex Parte* Affidavits Submitted On De Novo Appeal Were Not Admissible To Convert A Direct Contempt Into An Indirect Contempt.

Petitioner argues that a factual dispute existed concerning his "good-faith" explanation that he intended no disrespect, in that witnesses in the courtroom would have materially contradicted the trial court's characterization of his behavior. Essentially, he contends that he is entitled to utilize *ex parte* affidavits on appeal to convert the proceeding from a direct contempt *in facie curie* into an indirect contempt that requires a full plenary hearing before another judge. Of course, the admissibility of these *ex parte* affidavits is a question of state evidence law, and does not raise a federal question appropriate for review by this Court. Respondent submits that the state courts properly rejected any evidentiary significance of these affidavits under state law, and this Court is not at liberty to depart from the state appellate courts' resolution of this issue of state law.

Furthermore, in a letter brief opposing respondent's motion to supplement the record with Mr. Simon's affidavit, petitioner conceded (at p.4) that his supplemental affidavits contained material omissions and

... should not be accepted for the truth as to what happened in the courtroom on March 23, 2006, not having been subject to the accepted tests for credibility and trustworthiness. Thus, none of the affidavits offered has any relevance to the basic substantive issue in this appeal.

In light of his concession to the Appellate Division, petitioner's continuing effort to utilize these affidavits as substantive evidence is negligible.

In addressing the admissibility of these affidavits, the Appellate Division found,

[a]fter carefully considering these affidavits and the one submitted by Assistant Prosecutor Simon, we cannot conclude that there was a conflict, the resolution

of which required additional testimony. Moreover, even if, contrary to our conclusion, further testimony should have been elicited, the time for doing so was at the summary hearing. By choosing instead to rely upon the affidavits, defendant cannot transform the nature of his actions into that of an indirect contempt and thereby secure a plenary hearing to which he was not entitled. (Pa121-122).

Likewise, the state Supreme Court rejected the admissibility of these affidavits, holding that "we must deal with the record as we have it." (Pa14). This Court should also disregard petitioner's extensive references to these inadmissible affidavits. His version of the conversation with Mr. Simon is patent hearsay discredited by Mr. Simon's affidavit. Moreover, petitioner does not offer any rational explanation why a court attendant, who was not looking at or paying attention to petitioner at the time of the incident, is better qualified than a trial judge to determine whether petitioner's language was sarcastic and disrespectful, particularly when the plain words in the trial transcript support the trial judge's certification. Petitioner certainly provides this Court with no basis for stripping the trial judge of his authority to take judicial notice of conduct in his presence, and transforming this matter into an indirect contempt, contrary to state statutes and without any basis in federal law.

Moreover, we disagree with petitioner's contention that his denial of an intent to be disrespectful entitled him to a full plenary hearing before another judge as a matter of constitutional right. Denying a purpose to obstruct the court does not purge the contempt or constitute a defense where the gist of the offense is an overt act of disobedience or disrespect for the authority of the court. See *Clark v. United States*, 200 U.S. 1, 13 (1905); *Witt v. United States*, 200 F.2d 570, 576 (3d Cir. 1956). Petitioner's willful intent may be inferred from the facts and circumstances, including his evasions designed for the court's warnings. *United States v. Barrows*, 870 F.2d 1525, 1528 (3d Cir. 1989); *United States v. Delahanty*, 604 F.2d

396, 399 (6th Cir. 1973); *Sykes v. United States*, 444 F.2d 928, 930 (L.C. Cir. 1971); *Murphy v. State*, 46 Md. App. 138, 416 A2d 748, 756 (1980). The state Supreme Court understood the frustrations petitioner faced in confronting polygraph evidence that he believed to be unreliable, but held, "[i]t helps to explain his reaction but it does not excuse it." (Pa54). See *United States v. Giovanelli*, 897 F.2d 1227, 1232 (2d Cir. 1990). Petitioner was afforded the opportunity to present any proof of material facts of which the trial court was not aware, but he declined to do so. The facts were not in dispute, and petitioner's belated effort to create a putative issue on appeal do not warrant the conversion of this matter into something that it is not.

POINT IV

PETITIONER WAS NOT ENTITLED TO CONVERT THE SUMMARY HEARING INTO A FULL BLOWN TRIAL BY REQUESTING TO CONSULT WITH COUNSEL.

Petitioner attempts to portray a split of authority among jurisdictions as to whether the federal constitution entitles a person to the representation of counsel at a summary sentencing hearing when incarceration is a possible sentencing option. He relies on *Argersinger v. Hamlin*, 407 U.S. 25 (1972) for the proposition that no one may be imprisoned for even a petty offense if the party was denied the right to be represented by counsel. Of course, while the trial court imposed a sentence of two days incarceration as well as the \$100 fine, a stay was obtained that same day (Pa207), and the Appellate Division in its judgment vacated the term of incarceration as inappropriate. (Pa280). The state Supreme Court held that the Appellate Division "correctly vacated the jail term." (Pa6). Thus, this is not a case in which the defendant was ultimately sentenced to a period of incarceration. Petitioner does not face future incarceration since the jail term was vacated, no sentence has been fully executed with the payment of the fine and the appeal is concluded now. See Point I, supra. He is so standing to claim a right to counsel

based on possible sentencing options, as this right is dependent on the term of incarceration actually imposed. See generally, *Scott v. Illinois*, 440 U.S. 367 (1978). Furthermore, respondent submits that the sixth amendment and due process guarantees addressed in *Argersinger* do not extend to require the right to counsel in a summary contempt proceeding.

Contempt proceedings are traditionally characterized as "exi generis - neither civil actions nor prosecutions for offenses." *Myers v. United States*, 264 U.S. 95, 103 (1924). This Court has repeatedly indicated that the guarantee of right to counsel does not limit the summary contempt power. Thus, in *Cooke v. United States*, *supra*, the Court held that "[t]here is no need of evidence or the assistance of counsel before punishment, because the court has seen the offense." 267 U.S. at 534. *Accord*, *In re Oliner*, 233 U.S. at 275-276. This Court cited *Oliner* twice in reaching its conclusion in *Argersinger* and was undoubtedly aware of the implications of that decision - that an individual who commits contempt in the presence of the court can be tried instantly and even sentenced to jail, though he may not have been represented by counsel. Indeed, *Cooke* was cited with apparent approval in *United States v. Wilson*, 421 U.S. 309, 316 (1975), where one of the defendants did have counsel present at the time of the adjudication of contempt but it did not appear that counsel participated in the proceedings, and in *Young v. United States ex rel. Victim of Fide S.A.*, 481 U.S. at 799. This Court has always given every indication that it intends to keep intact the judicial power to punish summarily for contempts except in matters involving "serious contempts" entailing the imposition of a sentence of incarceration exceeding six months, where the right to jury trial and counsel are guaranteed. See, e.g., *Young v. United States ex rel. Victim of Fide S.A.*, 481 U.S. at 798-799.

Most jurisdictions that have considered the exception to the counsel requirement have followed *Oliner* and *Cooke* where the contempt was committed in the presence of the court and summary adjudication was found necessary to

maintain the court's authority. See, e.g., *United States v. Baldwin*, 770 F.2d 1550, 1553-1554 (11th Cir. 1985), cert. den. 475 U.S. 1120 (1986); *Matter of Heathcock*, 696 F.2d 1362, 1365 (11th Cir. 1983); *State v. Case*, 100 N.M. 173, 667 P.2d 978, 981-983 (Ct. App. 1983), aff'd after rem. 103 N.M. 574, 711 P.2d 19 (Ct. App. 1985); *Saunders v. State*, 319 So.2d 118, 125 (Fla. Ct. App. 1975); *Skolnick v. State*, 180 Ind. App. 253, 388 N.E.2d 1156, 1164 (1977), cert. den. 445 U.S. 906 (1980); for additional cases recognizing the exception to counsel requirement in summary contempt matters, see also *Mann v. Hendrian*, 871 F.2d 51, 52 (7th Cir. 1989); *United States v. Anderson*, 553 F.2d 1154, 1155 (8th Cir. 1977); *Circolo v. Madigan*, 443 F.2d 314, 319 (9th Cir. 1971); *Swisher v. United States*, 572 A.2d at 91; *In re Ellis*, 264 A.2d 300, 305 (D.C. App. 1970).

Petitioner relies upon cases which do not provide any reasoned basis for overturning *Oliner* and *Cook*. For example, the Pennsylvania Supreme Court in *Commonwealth v. Abrams*, 461 Pa. 227, 336 A.2d 308 (1975) and *Commonwealth v. Crawford*, 466 Pa. 269, 352 A.2d 52 (1976) simply held that *Argersinger* controlled without any analysis or consideration of the historic basis for the *Cook/Oliner* exception and the limited, distinguishable features of a summary contempt hearing. In *Potts v. State*, 421 A.2d 901 (Del. 1980), the court declined to decide the matter on constitutional grounds but held that until the issue was resolved by this Court, it was "better policy" in cases where there was no exigency unduly interfering with trial proceedings to afford counsel to indigent defendants. Thus, *Potts* is not constitutionally based and does not support petitioner's claim that a conflict exists among jurisdictions. Petitioner's reliance on *In re Grand Jury Proceedings: United States v. See Kong Kong*, 608 F.2d 1368, 1369 (9th Cir. 1972) is misplaced since it involved a civil contempt proceeding pursuant to 26 U.S.C. sec. 2624 against recalcitrant grand jury witnesses who were entitled to the procedural regularities prescribed by Fed. R. Crim. Proc. 42(b). Likewise, *Abrams v. United*

States, 344 F.2d 401, 411 (5th Cir. 1965) is distinguishable since it also involved a recalcitrant witness and there was a serious question of his mental competence. Furthermore, *Johnson* preceded *Argersinger* and made no reference to *Oliver* or *Cooke*, instead relying on *Johnson v. Zertst*, 304 U.S. 458 (1938) and other similar cases that had nothing to do with contempt. Thus, *Johnson's* rationale and precedential value are questionable. See *Nelson v. Holzman*, 300 F. Supp. 201, 202-203 (D. Or. 1969).

As the Appellate Division explained below, even in the unlikely event that *Argersinger* is read to limit the exercise of the summary contempt power, this is not a case in which such a limitation should apply since petitioner is an experienced trial attorney

who obviously understood the charges brought against him and could have responded thereto. There was no danger that the complexity of the issues involved or the "assembly-line" nature of the hearing resulted in any prejudice that the presence of outside counsel would have averted. Likewise, defendant here was not indigent or unable to appreciate the consequences of a guilty plea. In short, none of the rationales underlying the holding in *Argersinger* are present here. Thus, *Argersinger* cannot be interpreted as extending the right to counsel to defendant in this case. (Pa147).

The state Supreme Court agreed. (Pa148).

It is also significant that under New Jersey practice broad appellate review serves as a "judicial failsafe against not only trial court abuse, but trial court mistakes as well." *In Re Temp*, 84 N.J. at 135, 417 A.2d at 545 (Gardner, J., concurring). Since petitioner obtained counsel on appeal, his interests were amply safeguarded: counsel presented argument and addressed sentencing before the reviewing court with no diminution of effectiveness. The normal deference accorded on appeal to factual determinations of the trial court is replaced with suspicion in contempt appeals, where the reviewing court considers the matter *de novo*.

NOTION FILED

JUN 19 1989

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No. 89-1972

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

IN THE MATTER OF
JAMES B. DANIELS, an Attorney-at-Law of the
State of New Jersey,
Petitioner,
—v.—

SUPERIOR COURT OF THE STATE OF NEW JERSEY,
Respondent.

**MOTION FOR LEAVE TO FILE AND BRIEF OF
CENTER FOR CONSTITUTIONAL RIGHTS AS
AMICUS CURIAE IN SUPPORT OF PETITION FOR
CERTIORARI TO THE SUPREME COURT OF THE
STATE OF NEW JERSEY**

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**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

The Center for Constitutional Rights respectfully moves this Court for leave to file the attached brief amicus curiae in support of the petition for certiorari. We have obtained the consent of the petitioner, and a letter of consent from his counsel has been forwarded to the Clerk of the Court under separate cover. We were unable to obtain the consent of the New Jersey Attorney General, representing the respondent Superior Court of the State of New Jersey.

The petition presents questions of great importance for defining the constitutional limitations on the summary contempt power. They arise in this case out of the summary contempt conviction of a New Jersey public defender for non-verbal facial expressions which the judge considered disrespectful. This conviction of

a lawyer for conduct which did not come close to obstructing the administration of justice flies in the face of ruling precedents of this Court, particularly In re McConnell, 370 U.S. 230 (1962), which capped a long history of efforts to check the unbridled exercise of the contempt power. Unfortunately, the petitioner's plight is not an isolated one. Herein lies the interest of the Center.

Founded twenty-four years ago as an outgrowth of the civil rights movement in the South, the Center provides legal support to individuals and groups whose constitutional rights have been infringed or denied. In our work we rely not only on our own staff attorneys but on a network of cooperating lawyers and law professors throughout the United States. We often defend persons who have been prosecuted for exercising their constitutional

rights. The causes we espouse are not always popular. Out of our own experience we know how important it is that a lawyer be free to defend his clients with vigor, even vehemence, without having to fear that he may be held in contempt if an excess of zeal leads him to overstep the bounds of courtroom propriety.

Because our own attorneys and cooperating attorneys have from time to time been held in contempt, we are sensitive to the dangers that an untrammelled contempt power presents for our own work and that of other public interest organizations which seek to defend and enlarge constitutional rights. Over the years we have successfully defended lawyers in a number of contempt cases, among them In the Matter of Pilsbury, 866 F.2d 22 (2nd Cir. 1989); United States v. Turner, 812 F.2d 1552 (11th Cir. 1987); In re Dellinger,

461 F.2d 389 (7th Cir. 1972); Matter of Hinds, 90 N.J. 604 (1982). We are currently representing a professor of law at the University of North Carolina in his appeal of a criminal contempt conviction in a North Carolina state court. In the Matter of Barry Nakell, North Carolina Court of Appeals, No. 89 GO 848. We are also consulted from time to time in other lawyer contempt cases. We have, for example, been requested to file an amicus brief in this Court in support of the petition in Lawrence Hochheiser v. United States of America, Docket No. 89-1991, and will be doing so in a few days.

This special experience has led us to conclude that the teachings of McConnell are being widely forgotten or ignored, with devastating consequences for the constitutional rights of lawyers and their clients. We respectfully suggest that out

of this experience we can contribute an extra dimension to this case that would help the Court to decide, as we believe it should, that the petition should be granted.

Respectfully submitted,

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**BRIEF AMICUS CURIAE OF
CENTER FOR CONSTITUTIONAL RIGHTS**

This brief amicus curiae is submitted in support of the petition for certiorari seeking review of the decision of the Supreme Court of New Jersey in In the Matter of James B. Daniels, 118 N.J. 51, 570 A.2d 416 (1990).

Interest of Amicus

The Center for Constitutional Rights, founded twenty-four years ago as an outgrowth of the civil rights movement in the South, provides legal support to individuals and groups whose constitutional rights have been infringed or denied. In our work we rely not only on our own staff attorneys but on a network of cooperating lawyers and law professors throughout the United States. We often defend persons who have been prosecuted for exercising their constitutional rights. The causes we espouse are not always popular. Out of

our own experience we know how important it is that a lawyer be free to defend his clients with vigor, even vehemence, without having to fear that he may be held in contempt if an excess of zeal leads him to overstep the bounds of courtroom propriety. We believe that this is a right protected by the United States Constitution, and that a judge may not summarily hold a lawyer in contempt for behavior, however unseemly, that does not obstruct the administration of justice. We file this brief because this case, as well as another case in which we are filing an amicus brief in support of a petition for certiorari, Lawrence Hochheiser v. United States of America, Docket No. 89-1991, clearly presents this constitutional issue.

REASONS FOR GRANTING THE WRIT
AND SUMMARY OF ARGUMENT

The petitioner, James B. Daniels, a New Jersey public defender, was summarily convicted of criminal contempt of court for non-verbal facial expressions which the trial judge considered disrespectful. Although his conduct did not obstruct, or imminently threaten to obstruct, the administration of justice, the New Jersey Supreme Court affirmed his conviction under the New Jersey contempt statute because it had the mere "capacity" to obstruct the administration of justice. This vague standard does not comport with the constitutional requirements for exercise of the summary contempt power as laid down by this Court in In re McConnell, 370 U.S. 230 (1962) and In re Little, 404 U.S. 553 (1972). Such a standard, which permits disrespect without more to be grounds

for contempt, puts a damper on fearless advocacy by attorneys and diminishes the Sixth Amendment rights of their clients.

We point out that the facts and circumstances of this case parallel those of other lawyer contempt cases in which the Center has been involved in representing or counseling attorneys held summarily in contempt. McConnell and Little are the culmination of a long historical struggle to limit the arbitrary power of judges to convict summarily without the ordinary due process safeguards. We fear that their teachings are now too often forgotten, and suggest that this petition and the petition in Hochheiser present an exceptional opportunity to reestablish needed limitations on the contempt power.

ARGUMENT

THE COURT SHOULD SEIZE THE OPPORTUNITY PRESENTED BY THIS PETITION TO REAFFIRM THE CONSTITUTIONAL LIMITATIONS ON THE POWER OF COURTS TO PUNISH SUMMARILY FOR CONTEMPT ATTORNEYS WHOSE CONDUCT HAS NOT ACTUALLY OBSTRUCTED THE ADMINISTRATION OF JUSTICE

1. The Circumstances of the Petitioner's Contempt Conviction

The petitioner, James B. Daniels, an attorney in the Office of the Public Defender who had been assigned to represent the defendant in a prosecution for first-degree robbery, was held in contempt during pretrial proceedings for facial grimaces in reaction to a ruling of the judge which he found incomprehensible. This happened on the second day of pretrial. During the first day he had fought unsuccessfully to mitigate the adverse impact of a stipulation which permitted the State to introduce evidence of a polygraph test that the defendant had failed and prohibited the defendant from introducing or

alluding to a prior polygraph that he had passed "with flying colors," and even prevented the defendant from putting on an expert to refute the State's expert. Faced with the dire consequences for his client, Daniels persisted in his efforts to have the stipulation voided or modified. His persistence plainly annoyed the judge, who came to court the next day armed with a definition of contempt from the opinion in a New Jersey case, State v. Vasky, 203 N.J. Super. 91 (App. Div.1985).

On the second day, after the jury was selected but before it was sworn, Daniels moved for a mistrial on the ground that the prosecution had misused its peremptory challenges. In rendering his decision, the judge noted the requirement that the motion be made prior to swearing the jury; although not satisfied that this requirement had been met, he began to rule on the

assumption the motion was timely. It was at this moment that the behavior occurred which the judge, interrupting himself, described as "you laughed, you rolled your head, you threw yourself back in your seat." He pronounced Daniels in contempt of court and said that he would release the jury. Daniels, permitted to speak before the judge passed sentence, responded in substance that he had shown no disrespect but reacted as a human being to his disappointment that every single decision had gone against him.¹ The judge

¹ In a supplemental order, the trial judge elaborated upon his contemporaneous descriptions in the record of Daniels' behavior and found other instances of disrespect in his "inflections of voice and sarcastic manner of delivery." Affidavits submitted later by Daniels, the judge's clerk and the prosecutor agreed that the gestures for which Daniels was found in contempt were inaudible, and that his defense of his position, while vigorous, was conducted without exhibiting sarcasm or disrespect in manner or tone of voice.

forthwith sentenced him to serve two days in the County Jail, with immediate commitment, and to pay a \$500 fine.²

No jurors or prospective jurors were present during any of these proceedings.

The facts demonstrate that the behavior for which Daniels stands condemned grew out of and cannot be considered apart from his stubborn efforts on behalf of his client. They indicate that his reactions to the judge's rulings, however improper and however offensive to the trial judge, were not calculated to disrupt the trial or otherwise to obstruct or imminently threaten to obstruct the administration of justice, and did not in fact do so. They

² On appeal, the Appellate Division of the New Jersey Superior Court vacated the custodial portion of the sentence, noting that "the circumstances suggest that the harm visited upon the judicial system was not too severe." Pet. App. at 179a-180a.

clearly sprang from distress at his failure to sustain his client's position on issues crucial to his defense against serious criminal charges.³

In upholding the Appellate Division's affirmance of Daniels' conviction, the New Jersey Supreme Court did not find that Daniels had actually obstructed the orderly administration of justice. It was sufficient, as the court viewed it, that his conduct have "the capacity" to do so. Pet. App. at 28a. Adopting language from the dissent in the Appellate Division, it defined the standard as follows:

In short, any conduct is contemptible which bespeaks of scorn or disdain for a court or its authority.

³ As the New Jersey Supreme Court expressed it: "We can well understand the mounting frustrations that this attorney had faced in confronting scientific evidence that he believed to be unreliable." Pet. App. 54a.

Id. at 49a. This standard is constitutionally defective.

2. The Parallels to Other Attorney Contempts

The Daniels contempt conviction presents features that are found in a number of other attorney contempt cases in which the Center has been involved.

Jeopardy of Client. The attorney is faced with an adverse ruling which imperils the cause of his client and which he believes to be erroneous as a matter of law or based on a misunderstanding of the facts. This leads him to exceed the bounds of decorum in his efforts to overcome the ruling, arousing the judge's ire.

Gross Blunder by the Court. Sometimes the court takes a position that appears so incomprehensible to the attorney that he involuntarily lets his amazement show in a manner that offends the judge. This

happened to Daniels when the judge addressed his motion for a mistrial, timely made before the jury was sworn, with the remark that he was not satisfied this requirement had been met.

Court's Perception of "Body Language."

An overly sensitive judge reads into an attorney's demeanor, facial expression or tone of voice an intent to insult or mock the court, even where the content of the attorney's language has been uniformly respectful. The court dismisses any apology. Others present in the courtroom may have observed nothing offensive, but their testimony comes too late to affect a summary contempt finding.

Court's Bias Against Party. A feature present in a number of cases, although not apparent in Daniels' case, is the judge's antagonism to the attorney's client because of the nature of the offense with

which he is charged or the rights he is seeking to enforce. This antagonism may then be transferred to the attorney, a transfer that may readily occur when a rambunctious defendant engages in courtroom antics.

Disruption Caused by Court. The court proceedings are unnecessarily interrupted by a judge who takes umbrage at what he perceives to be disrespect by the attorney and orders his ejection from the courtroom or pronounces summary contempt. The attorney does not intend or foresee such an interference with the orderly administration of justice and should not be held accountable therefor. There was no need, indeed no excuse, in the case of Daniels for the judge to pack him straight off to jail and dismiss the jury.

We recognize that there have been instances when a lawyer has deliberately and

repeatedly provoked the court in order to gain the attention of the press or create grounds for a mistrial. Such behavior is plainly punishable as an obstruction to the administration of justice. Not so, conduct which erupts in the tense atmosphere of a trial where the attorney is simply doing his utmost to protect the interests of an endangered client.

3. Origins of the Constitutional Limitations on the Contempt Power

The contempt power of a federal court is limited by statute, in the case of conduct taking place before it, to "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." 18 U.S.C.

§ 401(1). This restriction is rooted in constitutional considerations that arose in the impeachment trial of James H. Peck, a federal district judge who had im-

prisoned a lawyer for publishing a criticism of one of his opinions in a case on appeal. Judge Peck was acquitted by a single vote after a trial that continued over a period of almost two months.⁴ The day after his acquittal Congress took steps to provide for a drastic delimitation of the federal contempt power. Within a few days James Buchanan, the principal manager of the case against Peck (and afterwards elected President), brought in a bill that became the Act of March 2, 1831, 4 Stat. 487. This Act, "declaratory of the law concerning contempts of court," confined the summary contempt power, inter alia, to misbehavior "in the presence of said courts, or so near thereto as to obstruct the ad-

⁴ The trial is reported in full in Stansbury, Report of the Trial of James H. Peck on an Impeachment for High Misdemeanors in Office (1933).

ministration of justice," -- language almost identical with that now found in 18 U.S.C. § 401(1). See, Nye v. United States, 313 U.S. 33, 44-46 (1941).

The arguments by Buchanan and other managers of the case against Peck demonstrate that their passionate opposition to the broad contempt powers urged by those charged with Peck's defense sprang from their conviction that such powers contravened the principles for which the Revolution was fought and threatened liberties guaranteed by the Constitution. Constitutional concerns were at the heart of the impeachment proceedings and the legislation that ensued.

The arguments of the managers against untrammelled powers of summary contempt reflect concerns that persevere to this day: the lack of ordinary due process with the concentration of all powers in

the judge; the absence of any clear standard; dependence on the temperament of the judge. As expressed by Buchanan: "the dearest rights of a citizen may be taken away without trial by jury, and by the sole authority of an angry, offended, and therefore partial judge." Stanbury, op. cit., at 445-46. The managers recognized the "plea of necessity," the right of a court to preserve its own functioning; but, as stated by M'Duffie, this plea must be "pleaded in good faith, and clearly made out. It must be a case of actual necessity, obvious to the common sense of every impartial person. The administration of justice must be actually obstructed." Id., at 87. The managers were unanimous that this was a constitutional minimum.

4. Actual Obstruction as the Sine Qua Non
for Constitutional Exercise of the
Contempt Power

Seventy years ago, in Ex parte Hudgings, 249 U.S. 378 (1919), this Court, in overturning the contempt conviction of a witness for perjury, enunciated the principles that set constitutional boundaries to the contempt power. It held that the existence of this power expressed no purpose to exempt judicial authority from constitutional limitations, since "its great and only purpose" is to secure judicial authority from obstruction to the performance of its duties:

An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest.

249 U.S. at 383.

In a number of later cases this Court has plainly read the statutory requirement

of actual obstruction as a constitutional limitation deriving from the Peck trial. Nye v. United States, supra; In re Michael, 326 U.S. 224, 227 (1945); Cammer v. United States, 350 U.S. 399, 406 (1956). In Bridges v. California, 314 U.S. 252 (1941), this Court struck down, as violative of the First Amendment, the power of a judge to punish publications as contempts on a finding of "a mere tendency" to interfere with the orderly administration of justice in a pending case. Reviewing the "celebrated case of Judge Peck," the Court concluded:

But we do find in the enactment [of the Act of 1831] viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated.

314 U.S. at 267.

Bridges demonstrates that the limi-

tation of the contempt power to actual obstruction serves to protect, among other rights, the First Amendment right of free expression which, under the Fourteenth Amendment, binds the states. In In re Oliver, 333 U.S. 257, 275 (1948), this Court reversed a Michigan contempt conviction for failure to meet due process safeguards, stating that the narrow exception to such due process requirements includes only charges of misconduct, in open court in the presence of the judge, which disturbs the court's business and where "immediate punishment is essential to prevent 'demoralization of the court's authority . . . before the public.'"

In a multitude of cases this Court has shown its continuing sensitivity to the potential for abuse which resides in the summary power of contempt. The vulnerability of the judge is a frequent theme.

In Bloom v. Illinois, 391 U.S. 194, 202 (1968), which extended the constitutional guarantees of jury trial to state prosecutions for serious criminal contempts, this Court commented:

Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament.

Again, in Offutt v. United States, 348 U.S. 11, 13 (1954), remanding a contempt conviction for a second hearing by another judge because the trial judge had become personally embroiled with counsel for the defendant, this Court said:

The power thus entrusted to the judge [to punish without the formalities required by the Bill of Rights] is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges are human, and may, in a human way, quite unwittingly identify offense to self with obstruction of law.

Cf. Brown v. United States, 356 U.S. 148, 153 (1958), where this Court warned trial

judges against "confusing offense to their sensibilities with obstruction to the administration of justice."

5. Constitutional Limitations in Lawyer Contempts

The danger of confusing perceived offense with actual obstruction looms large when confrontations arise between judge and lawyer over disagreement on the judge's rulings. Here not only First Amendment and due process considerations come into play, but also the need to give uninhibited effect to the Sixth Amendment right of a criminal defendant to assistance of counsel. In such situations this Court has required a clear showing of actual obstruction of justice. In re McConnell, 370 U.S. 230 (1962). The lawyer in this case, after being instructed by the judge in the presence of the jury to refrain from repeatedly asking ques-

tions on certain subjects which the court had ruled were not admissible, persisted in asserting his right to ask the questions and announced that he "propose[d] to do so unless some bailiff stops us." After a short recess requested by his co-counsel, the lawyer did not continue to ask the forbidden questions. In reversing his conviction for contempt, this Court said:

The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

370 U.S. at 236. Cf. Holt v. Virginia, 381 U.S. 131 (1965) (reversing on Sixth Amendment grounds the conviction of a lawyer for using "vile, contemptuous or insulting language" in violation of the Virginia contempt state; In re Little, 404

U.S. 553, 555 (1972) (pro se criminal defendant in state court "clearly entitled to as much latitude in conducting his defense" as enjoyed by counsel vigorously espousing a client's cause).

The New Jersey contempt statute, as interpreted by the Supreme Court of New Jersey, makes punishable by summary contempt conduct which merely has "the capacity" to obstruct the administration of justice. The statute does not require a clear showing of actual obstruction, nor did the New Jersey court find that petitioner had actually, or imminently threatened, such an obstruction. Mr. Daniel's case displays many of the features catalogued by Buchanan and his confreres as leading to dangerous oppression when the contempt power is untrammelled: a lawyer unable to mask his involuntary feeling that the judge's ruling was absurd, "in-

decorous gestures," the susceptibility of the judge, the offended judge as sole arbiter of the offense imposing punishment before "his resentment should have time to cool," even to the judge's construing the lawyer's denial of any disrespectful intent as "disingenuous." See, Pet. App. at 97a. A judge may not constitutionally be permitted to "carry the standard in his own breast."

We respectfully suggest that this petition presents an exceptional opportunity for the Court to reassert the constitutional limitations on the exercise of the summary contempt power and thereby provide much needed guidance both to the federal courts and the courts of the fifty states. We suggest, also, that the Court likewise agree to hear the petitioner in Lawrence Hochheiser v. United States, Docket No. 89-1991, which presents similar issues of

lawyer contempt, and that it consider the two petitions jointly.

CONCLUSION

For the reasons stated, we respectfully urge that the petition be granted.

Respectfully submitted,

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